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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH P. ZAUBER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEIN, ZAUDERER, ELLENHORN,
FRISCHER & SHARP
SIDNEY H. STEIN*
ROANNE L. MANN
Attorneys for Petitioner
Kenneth P. Zauber
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

**Counsel of Record*

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QUESTION PRESENTED FOR REVIEW

Whether a general verdict of guilt for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") must be set aside where the Court of Appeals, following this Court's decision in McNally v. United States, 107 S.Ct. 2875 (1987), struck as defective all the mail and wire fraud substantive counts and predicate acts of racketeering, leaving but one substantive count and two categories of predicate acts, which the jury might not have relied upon in returning its verdict on the RICO conspiracy count.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

In addition to Zauber and the respondent, the proceedings before the Court of Appeals for the Third Circuit included co-defendants Robert Coar and Frank Scotto, who have jointly filed a petition for certiorari.

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IN THE

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OCTOBER TERM, 1988

KENNETH P. ZAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Kenneth P. Zauber respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered in this case on August 31, 1988, insofar as it affirmed Zauber's conviction on Count One of the indictment, which charged him and others

with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of Title 18, United States Code, Section 1962(d). In the pertinent portion of its opinion, the Court of Appeals held that although this Court's decision in McNally v. United States, 107 S.Ct. 2875 (1987), required that it strike the indictment's allegations of mail and wire fraud (including a series of predicate acts of racketeering and all but one of the substantive counts), the jury's verdict on the RICO count would nevertheless be permitted to stand. The Court of Appeals reached this result notwithstanding the fact that the general verdict returned by the jury did not identify those predicate acts on which it relied in convicting petitioner of RICO conspiracy.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated August 31, 1988, is reported as United States v. Zauber, 857 F.2d 137 (3d Cir. 1988). The Court's slip opinion -- to which is appended a copy of the redacted indictment submitted to the jury -- appears in the Appendix to this petition at pages A1-A57. The slip opinion was amended on November 10, 1988; the Third Circuit's Order Amending Slip Opinion is reproduced at pages B1-B3 of the Appendix. Four orders of the Court of Appeals denying the government's petition for rehearing and the defendants' petitions for rehearing or rehearing en banc appear at pages C1-C8 of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered August 31, 1988. Zauber's timely petition for rehearing or

rehearing en banc was denied on November 10, 1988. This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a conspiracy conviction under the RICO Act, 18 U.S.C. § 1961 et seq. Charged as predicate acts of racketeering activity are violations of 18 U.S.C. § 1954, entitled "Offer, acceptance, or solicitation to influence operations of employee benefit plan." Pertinent portions of these statutes are set forth at pages F1-F3 of the Appendix.

This case also involves provisions of the United States Constitution, to wit, Article III, Section 2, and the Sixth Amendment, which guarantee the right to trial by jury in criminal cases. (See F3).

STATEMENT OF THE CASE

The charges filed against Zauber all arose out of his employment as general counsel to an employee pension benefit plan maintained by Local 701 of the International Brotherhood of Teamsters (hereinafter "the Fund"). In October 1982, the two trustees to the Fund, co-defendants Robert Coar and Frank Scotto, caused the Fund to invest $20 million with a mortgage brokerage company called the Omni Funding Group, Inc. ("Omni"). The government contended that Zauber, Coar and Scotto assisted Omni in this transaction as part of a kickback scheme.

Proceedings In The District Court

Four successive indictments were filed against Zauber in the District of New Jersey. Zauber was first indicted on September 19, 1985, in a 75-count

indictment. Each of the three superseding indictments was more expansive than the ones that preceded it.

On September 8, 1986, Zauber, Coar and Scotto went to trial on the third superseding indictment, which -- because of numerous deficiencies in the government's proof -- was reduced from ninety to six counts at the close of the government's case. Count One of the redacted indictment charged a RICO conspiracy; as its predicate acts of racketeering, Count One alleged that the defendants, on numerous (but unspecified) occasions, would and did violate the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 (see A49-A53), and a federal law relating to unlawful pension fund payments, 18 U.S.C. § 1954 (see A50, A52). Counts Two through Five charged various defendants with substantive mail and wire fraud violations (A54-A56), and Count Six

charged Zauber with a substantive violation of 18 U.S.C. § 1954. (A56-A57). All of the fraud allegations in the indictment rested on the theory that the defendants had defrauded the Fund of the right to honest, faithful, prudent and diligent services by its employees. (See, e.g., A41-A42).

The general verdict returned by the jury found each defendant guilty on all the counts in which he was named. On April 24, 1987, the Honorable John F. Gerry sentenced Zauber on Count One to a four-year term of imprisonment and a $25,000 fine; on Counts Five and Six, the Court imposed two-year prison terms, to run concurrently with each other and with the four-year sentence on the RICO conspiracy count.

Proceedings In The Court Of Appeals

Zauber appealed his conviction to the Court of Appeals for the Third

Circuit, as did co-defendants Coar and Scotto. On June 24, 1987, before the defendants' briefs were filed, this Court held in McNally v. United States, supra, 107 S.Ct. at 2881, that the mail fraud statute is "limited in scope to the protection of property rights." Thereafter, as his principal argument on appeal, Zauber contended that McNally required that the mail and wire fraud allegations be stricken from the indictment, necessitating reversals on all counts, including the RICO conspiracy count. See, e.g., United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979). In response, the government, in both its brief and at oral argument, sought to distinguish McNally but made no attempt whatsoever to defend the RICO charge absent the mail and wire fraud allegations.

More than two months after oral argument in the Court of Appeals, the Third Circuit requested and received supplemental briefing concerning whether, disregarding the fraud allegations charged as predicate acts of racketeering, the RICO charge could be sustained on the basis of a pattern of racketeering activity consisting solely of violations of section 1954. (See E1-E3). In an argument to which the defendants had no opportunity to respond,[1] the government for the first time contrived a theory to defend the jury's RICO verdict on this ground. Thereafter, on August 31, 1988, the Court of Appeals held that the indictment failed to allege valid mail and wire fraud violations under McNally; the Court dismissed the substantive counts of mail and wire fraud, struck the fraud

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[1] The Court directed that the parties' memoranda be filed by the same date. (See E3).

allegations from the RICO conspiracy count, yet affirmed the defendants' convictions on that charge.[2]

The Court of Appeals concluded that even absent the mail and wire fraud allegations, Count One alleged a proper pattern of racketeering activity comprising multiple violations of section 1954; the Court relied on allegations in Count One that the defendants "would, on multiple occasions solicit, agree to receive, and actually receive certain kickbacks . . . ." (A42-43, A50, A52).[3]

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[2] In a portion of its opinion not at issue here, the Court of Appeals sustained Zauber's conviction on Count Six, which charged a substantive violation of section 1954. (A36 n.20).

[3] Though conceding that Zauber's argument had "superficial appeal" (A23), the Third Circuit rejected Zauber's challenge to the adequacy of the charging language of Count One, as further redacted; Zauber contended that once the fraud allegations were stricken from Count One, the language remaining, which parallels that in the indictment's only substantive section 1954 count, at most alleged a course of conduct

(footnote continued)

Despite the absence of special findings by the jury on the predicate acts underlying its guilty verdicts on Count One, the Court then affirmed the defendants' convictions on the RICO charge. (See A30-A35).

On September 9, 1988, the Third Circuit granted motions filed by both the government and the defendants for 30-day extensions of time within which to file petitions for rehearing. On October 14, 1988, Zauber filed a timely petition for rehearing, as did his co-defendants and the government. On November 10, 1988, the Court of Appeals denied all four petitions

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(footnote continued from previous page) constituting a single violation of section 1954, rather than a pattern of racketeering activity. See United States v. Provenzano, 334 F.2d 678, 684 (3d Cir.), cert. denied, 379 U.S. 947 (1964) (holding that a series of payments comprised a "single continuous plan" of extortion that constituted but one "unit of prosecution" under the Hobbs Act); accord, United States v. Hedman, 630 F.2d 1184, 1199 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

(C1-C8) and entered an Order Amending Slip Opinion, in which the Court of Appeals modified portions of the opinion that are not material to the issues addressed herein (B1-B3).

On December 8, 1988, the Third Circuit temporarily stayed the issuance of the mandate in this case, pending the filing of petitions for certiorari (D1-D3).

REASONS FOR GRANTING THE WRIT

This case presents several important questions of federal law that have divided the Circuits and that have not been addressed by this Court in the context of a RICO case.

The central question posed by this petition is whether a general verdict of guilty on a RICO charge must be set aside where legal defects in the indictment cause the reviewing court to strike some of the predicate acts of

racketeering and all but one of the corresponding substantive counts. Consistent with principles of constitutional law long established by this Court, several Courts of Appeals have reversed RICO convictions in circumstances similar to those presented here. The Third Circuit, in contrast, affirmed petitioner's RICO conviction on the basis of its own factual findings, with no assurance that the jury itself unanimously found the facts necessary to sustain the conviction.

Implicated in the Third Circuit's decision is yet another question of RICO law, which has likewise generated an unresolved conflict among the various Courts of Appeals. As an essential part of its rationale for affirming petitioner's conviction on Count One, the Third Circuit held that to be convicted of conspiracy to violate section 1962(c) of

the RICO statute, the defendant need only have agreed that members of the conspiracy would commit two predicate acts of racketeering activity, and need not have agreed to participate himself in those acts of racketeering. As discussed below, two Circuits have held otherwise and thus would not have sustained petitioner's conviction on Count One.

The confluence of these two important issues in a single case makes this a particularly appropriate occasion for Supreme Court review.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO REVIEW THE THIRD CIRCUIT'S DECISION, WHICH IS CONTRARY TO THE PRINCIPLE ESTABLISHED BY THIS COURT IN STROMBERG v. CALIFORNIA, AND, IN TWO RESPECTS, IS CONTRARY TO DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

A. The Principle Of Stromberg And Its Progeny

The Third Circuit's decision violates the principle established by this Court in Stromberg v. California, 283 U.S. 359 (1931). The appellant in Stromberg was convicted by a jury under a state statute prohibiting the public display of a red flag for any one of three purposes. Concluding that it would be unconstitutional to punish a person who displayed such a flag for the first specified reason, this Court rejected the state court's reasoning that the appellant's conviction could nevertheless be upheld on the basis of the two valid statutory reasons. This Court explained:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [I]t is impossible to say under what clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that . . . the conviction cannot be upheld.

Id. at 367-68.

In a subsequent case, this Court expressly acknowledged the constitutional underpinnings of the principle established in Stromberg: "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid . . . ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights." Williams v. North Carolina, 317 U.S. 287, 292 (1942). Hence, the Stromberg principle "has been consistently

followed" by this Court. Street v. New York, 394 U.S. 576, 586 (1969). See, e.g., Chiarella v. United States, 445 U.S. 222, 237 n.21 (1980); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Leary v. United States, 395 U.S. 6, 31-32 (1969); Yates v. United States, 354 U.S. 298, 311-12 (1957); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Williams v. North Carolina, supra, 317 U.S. at 291-92.[4]

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[4] Similarly, Courts of Appeals have repeatedly reversed convictions in cases involving multi-object conspiracy counts in which one of the objects was later found to be invalid or insufficiently proven. See, e.g., United States v. Irwin, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980); United States v. Carman, 577 F.2d 556, 566-68 (9th Cir. 1978); United States v. Dansker, 537 F.2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir. 1963).

As this Court has declared, "unless the record negates the possibility that the conviction was based" to any extent on an invalid ground, the verdict must be set aside. Street v. New York, supra, 394 U.S. at 588. Stated differently, "[c]riminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently." United States v. Carman, 577 F.2d 556, 568 (9th Cir. 1978).

The reasoning of Stromberg applies with particular force to the present case and mandates reversal of petitioner's RICO conviction. Here, the jury was charged that a unanimous finding as to any two predicate acts of racketeering -- including individual acts of mail or wire fraud -- would support a conviction for RICO conspiracy. The general verdict returned by the jury on Count One

does not reveal the number or nature of predicate acts on which it relied; the fact that the jury convicted the defendants on substantive fraud counts that the Third Circuit agreed were defective as a matter of law reinforces the risk that the jury "might have relied on those charges as predicate offenses when considering the RICO claim." United States v. Riccobene, 709 F.2d 214, 229 (3d Cir.), cert. denied, 464 U.S. 849 (1983). And the dismissal of those defective counts left undisturbed but a single substantive violation. Since the jury's verdict reflects a unanimous finding of guilt as to only one offense that survives McNally, a substantial possibility exists that the jury relied on the invalid allegations of wire and mail fraud in returning guilty verdicts on Count One.

B. Recent Circuit Court Decisions Reversing General Verdicts In RICO Cases

The Third Circuit's refusal to follow the reasoning of Stromberg is at odds with recent decisions of other Circuits reversing RICO convictions that might have rested on defective predicate acts. The Seventh Circuit's decision in United States v. Holzer, 840 F.2d 1343, 1352 (7th Cir. 1988), likewise involved mail fraud allegations held invalid after McNally. In Holzer, as here, in addition to the mail fraud charges, the defendant was convicted of racketeering and one other substantive violation; in Holzer, as here, the jury's verdicts provided no assurance that it had relied on at least two predicate acts other than the defective mail fraud allegations. Unable to eliminate the possibility of a conviction based on an invalid predicate

act, the Seventh Circuit reversed the defendant's RICO conviction and remanded the count for a new trial. Id.

Similarly, in United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the Second Circuit struck a legally defective predicate act (relating to gambling) and reversed defendant Santora's conviction for RICO conspiracy. The Court of Appeals explained:

> Because the jury was asked to determine only the guilt or innocence of Santora on the RICO conspiracy count, we cannot tell from its verdict on Count One what decisions it made with respect to the eight predicate acts. Its verdict of guilty establishes that Santora had committed at least two of the charged predicate conspiracies. For all we know, the jury may have found he committed more than two, possibly even all eight. However, absent some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient, we are required to reverse the conviction because the legally insufficient pred-

> icate act relating to gambling may have been necessary to the verdict.

Id. at 921.

The Eleventh Circuit reached a similar result in United States v. Alexander, 850 F.2d 1500, 1506 (11th Cir. 1988), reversing the RICO conviction of the defendant Grider, who was charged in only one substantive offense that survived McNally.

C. The Decision in Zauber

The Third Circuit's affirmance of petitioner's RICO conviction conflicts with the decisions of these other Courts of Appeals and departs from its own prior decision in United States v. Brown, supra, 583 F.2d 659.[5] In mistakenly presuming

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[5] In Brown, the Third Circuit struck defective mail fraud allegations from the indictment and reversed the defendants' convictions on two RICO counts, notwithstanding the jury's finding of guilt on two valid substantive counts that were also charged as predicate acts of racketeering in both RICO counts. Id. at 669-70.

that the jury in this case did not rely on the defective mail and wire fraud allegations contained in Count One, the Third Circuit, in essence, substituted its own special findings for that of the jury.

The Court of Appeals in Zauber employed the following analysis: The jury was charged that it had to find a kickback scheme in order to convict a defendant of RICO conspiracy. (A30). Since the jury convicted each of the three defendants of RICO conspiracy, it implicitly found that each had agreed to a kickback scheme and, the Court held, to the commission of at least three violations of section 1954. (A31-A32). Consequently, the Court of Appeals concluded, "the jury necessarily did not rely on the invalid mail and wire fraud violations" charged in Count One. (A35). As shown below, the Court's analysis is fatally flawed in several respects.

1. The Third Circuit's Construction Of Section 1962(d)

As an initial matter, the Third Circuit's decision rests on an interpretation of the RICO conspiracy statute that has generated disagreement among the Circuits. See Adams v. United States, 474 U.S. 971 (1985) (White, J., joined by Burger, C.J., dissenting from denial of certiorari). The Third Circuit has held that section 1962(d) requires only an agreement that members of the conspiracy will violate section 1962(c) by committing the requisite two or more acts of racketeering activity. See A23, citing United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985). Accord, United States v. Kragness, 830 F.2d 842, 860 (8th Cir. 1987); United States v. Neapolitan, 791 F.2d 489, 494-98 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v.

Joseph, 781 F.2d 549, 554 (6th Cir. 1986); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Carter, 721 F.2d 1514, 1528-31 (11th Cir.), cert. denied, 469 U.S. 819 (1984). Two Circuits have taken a contrary position, holding that a conviction under section 1962(d) for conspiracy to violate section 1962(c) requires that the defendant have agreed to participate himself in two or more acts of racketeering activity. See United States v. Ruggiero, supra, 726 F.2d at 921; United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983). Several Circuits have expressly declined to resolve this dispute, see United States v. Killip, 819 F.2d 1542, 1547-48 (10th Cir.), cert. denied, 108 S.Ct. 186 (1987); United States v. Manzella, 782 F.2d 533, 537-38

n.1 (5th Cir.), cert. denied, 476 U.S. 1123 (1986), and one (the Fourth) has apparently not addressed the issue.

As several Justices have previously indicated, such a fundamental conflict among the Circuits ought to be resolved by this Court. See Adams v. United States, supra, 474 U.S. 971; Neapolitan v. United States, 479 U.S. 940 (1986) (White, J., and Marshall, J., voting to grant certiorari). In adopting the Third Circuit's position on this issue, the Seventh Circuit in United States v. Neapolitan, supra, 791 F.2d 489, nevertheless acknowledged that the question before it turned on "less than pellucid" statutory language, id. at 495, and "offer[ed] a number of tough policy questions," id. at 498, on which the Justice Department has itself taken inconsistent positions. Id. at 494-95; see also United States v. Winter, supra,

663 F.2d at 1136 (government conceded that "a RICO conspiracy [must] be established by proof that each defendant agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity").

Had petitioner been tried in either the First or Second Circuit, his RICO conviction would certainly have been reversed; even as (erroneously) construed by the Third Circuit (see p. 22-23, supra), the jury's verdict in this case provides no assurance that the jury found that petitioner agreed that he himself would participate in two or more acts of racketeering other than those invalidated under McNally. Accordingly, the Third Circuit's expansive interpretation of section 1962(d) is essential to its affirmance of petitioner's RICO

conviction. The sharp division among the Courts of Appeals on this critical issue warrants resolution by this Court.

2. The Third Circuit's Violation Of The Stromberg Principle

Moreover, even accepting the Third Circuit's statutory construction of section 1962(d), the decision in Zauber violates the principles underlying Stromberg and its progeny. In straining to uphold the jury's general verdict on Count One, the Court of Appeals ignored the different findings needed to support a verdict of guilt under section 1954 and a finding of participation in a RICO conspiracy. With respect to the latter, the jury was instructed that in order to convict on Count One, it had to find that the defendants, being associated with the specified enterprise (i.e., Omni), "conspired and agreed with each other" to participate in the conduct of Omni's

affairs "through a pattern of racketeering activity, which consisted of a kickback scheme facilitated by mail and wire fraud."[6] The instructions thus permitted the jury to find all three defendants guilty of RICO conspiracy on the basis of a mutual agreement to join a kickback scheme -- with the pattern requirement satisfied by multiple acts of mail and/or wire fraud. As the government emphasized in its rebuttal summation, the jury was not required to find that kickbacks were in fact paid to each defendant; nor did the jury have to conclude that each defendant individually solicited kickbacks from Omni. Consistent with the trial court's instructions, the jury could have rested all its Count One findings as to

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[6] See Appellants' Joint Appendix On Appeal From Judgment Of Conviction, at p. 990 (emphasis added). The jury was also charged that to be "associated" with Omni, the defendant need only "agree to receive" concealed payments from Omni's profits. (See id. at 991, 989).

the defendants' association and participation on one agreement to violate section 1954.

Accordingly, contrary to the Third Circuit's assumption, although the jury necessarily found the existence of a kickback scheme, it need not have found an agreement to commit three (or even two) separate violations of section 1954. Thus, the jury's verdict does not necessarily imply a finding of a pattern of section 1954 violations. Cf. Bell v. United States, 349 U.S. 81, 83 (1955) (under rule of lenity, simultaneous interstate transportation of two or more women for immoral purposes constitutes a single violation of the Mann Act).

3. The Third Circuit's Disregard Of The Constitutional Guarantee Of Jury Unanimity

Furthermore, the Third Circuit's assumption that the jury necessarily found

such a pattern is erroneous for yet another reason, which the panel apparently overlooked. In accordance with the constitutional requirement of jury unanimity, the trial court properly charged that in order to find the requisite pattern of racketeering activity, the jury had to find unanimously that the defendant under consideration "agreed to the commission of at least two particular racketeering acts."[7] See United States v. Cauble, 706 F.2d 1322, 1345 (5th Cir.), cert. denied, 465 U.S. 1005 (1983). However, in order to find the defendant to be a member of the Count One conspiracy, the jurors need only have agreed that the defendant at some point joined the kickback scheme; they need not have achieved unanimity as to any specific violation of section 1954.

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[7] At the government's urging, the trial court charged that each individual violation of the mail and wire fraud and kickback statutes constituted a separate act of racketeering.

Thus, in convicting petitioner on Count One, the jury might well have found a kickback scheme that was effectuated through a pattern of racketeering consisting of violations of the mail and wire fraud statutes. To paraphrase the Third Circuit in United States v. Beros, 833 F.2d 455, 462 (3d Cir. 1987), "[i]n this scenario, the jury would unanimously conclude that there was a mode or manner of violating [section 1962(d)], but there would be no unanimity as to [any section 1954] predicate act." Hence, the Court of Appeals' decision in Zauber improperly permits the government on appeal to rely "on a composite theory of guilt, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act [charged under

section 1954] supported the verdict." United States v. Beros, supra, 833 F.2d at 462.

Accordingly, the jury's verdicts of guilty on the RICO count cannot be construed to imply a unanimous finding of two or more predicate acts of racketeering in violation of section 1954. On the contrary, it would have been "neither illogical nor impossible" for the jury to fail to agree on a pattern of section 1954 violations while, at the same time, convicting petitioner on the RICO charge.[8] Where such a possibility exists, a court is "not free to hypothesize whether the jury indeed agreed to" the surviving predicate acts of racketeering. United States v. Echeverry, 698 F.2d 375, 377, modified en banc, 719 F.2d 974 (9th Cir. 1983). Since the jury might have relied

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[8] United States v. Dansker, supra, 537 F.2d at 51; see United States v. Holzer, supra, 840 F.2d at 1351.

on the invalid mail and wire fraud violations -- and, in light of its verdicts on the substantive fraud counts, probably did rely on those defective allegations -- the rationales of both Stromberg and the unanimity cases mandate that petitioner's RICO conviction be reversed.

4. The Third Circuit's Misplaced Reliance On Inapposite Cases

The two decisions cited by the Court in Zauber do not hold otherwise: i.e., United States v. Weisman, 624 F.2d 1118, 1124-25 (2d Cir.), cert. denied, 449 U.S. 871 (1980) (quoted at A32-A33), and United States v. Brennan, 685 F. Supp. 883, 885 (E.D.N.Y. 1988) (quoted at A35). In contrast to this case, the defendants in both Weisman and Brennan were convicted of a series of substantive counts that were also charged as valid predicate acts of racketeering, which survived the Courts' striking of several invalid

predicate acts. Treating the convictions on the valid counts as special interrogatories on the remaining acts of racketeering, the Second Circuit in Weisman and the District Court in Brennan affirmed the defendants' RICO convictions.[9]

Other Courts have similarly upheld RICO convictions where, unlike here, the jury additionally found the defendant guilty on two or more substantive counts that were charged as valid predicate acts under RICO. See, e.g., United States v. Bailey, 859 F.2d 1265, 1278 n.4 (7th Cir. 1988); United States v. Alexander, supra, 850 F.2d at 1506; United States v. Lopez, 803 F.2d 969, 976-77 (9th Cir. 1986), cert. denied,

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[9] However, in Brown, supra, 583 F.2d at 669-70, the Third Circuit had declined to uphold the defendants' RICO convictions, notwithstanding the jury's guilty verdicts on two substantive counts that were also charged as valid predicate acts of racketeering.

107 S.Ct. 1958 (1987); United States v. Peacock, 654 F.2d 339, 348 (5th Cir. 1981), modified on other grounds, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983); United States v. Cooper, 639 F. Supp. 176, 182 (M.D. Fla. 1986), aff'd, 822 F.2d 63 (11th Cir.), cert. denied sub nom. McCulloch v. United States, 108 S.Ct. 337 (1987); cf. United States v. Anderson, 809 F.2d 1281, 1283-85 (7th Cir. 1987).[10] However, in assessing the adequacy of the jury's findings under RICO, those Courts have refused to sustain a RICO conviction on the basis of a

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[10] In United States v. Leisure, 844 F.2d 1347, 1367 (8th Cir. 1988), cert. denied sub nom. Wougamon v. United States, 57 U.S.L.W. 3348 (U.S. Nov. 14, 1988), the Eighth Circuit upheld a defendant's conviction for RICO conspiracy on the basis of acts charged against his co-defendants in three corresponding substantive counts. Though we submit that Leisure was wrongly decided, see pp. 23-27, supra, it is, in any event, distinguishable from this case, in which only one substantive count survived on appeal.

predicate act as to which there was no corresponding substantive count and thus no separate (and unanimous) finding of guilt by the jury. See United States v. Cooper, supra, 639 F. Supp. at 180 n.3; see also United States v. Alexander, supra, 850 F.2d at 1506 (upholding RICO conviction of defendant convicted on two valid substantive counts; reversing RICO conviction of defendant convicted on only one surviving substantive count). Simply put, any possibility that the jury might have relied on defective allegations in the indictment must be resolved in the defendant's favor. See United States v. Holzer, supra; United States v. Ruggiero, supra. As succinctly stated by this Court: "For all we know, the conviction did rest on that [invalid] ground." Leary v. United States, supra, 395 U.S. at 31.

Indeed, even the Court that decided Weisman -- the case on which the Third Circuit purported to rely -- would not sustain a RICO conviction where, as here, the jury's verdicts on the surviving portions of the indictment provide no assurance that in finding the requisite pattern of racketeering activity, the jury relied on valid predicate acts. In United States v. Ruggiero, supra, 726 F.2d 913, the Second Circuit struck a legally defective predicate act and reversed a RICO conspiracy conviction. Distinguishing Weisman and a similar Second Circuit case, the Court explained that in those decisions

> this court found that the defendant's convictions on separate substantive counts alleged in the same indictment were sufficient to establish the requisite pattern of racketeering activity for the RICO conviction. In each of those cases, however, the substantive crimes relied on were also alleged in

> the RICO count as predicate acts of racketeering, so that the court was assured by the separate convictions that the jury had found defendant guilty of committing at least two of the predicate acts alleged in the indictment.

726 F.2d at 922 (emphasis added). Unlike Weisman, the Court in Ruggiero "ha[d] no such assurance," since the jury findings on which the government sought to rely were not identical to those necessary to sustain the challenged RICO count. Id.[11] Declining the government's invitation to overlook these legal distinctions, the Court concluded: "Since we cannot determine otherwise from the jury's

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[11] Santora, the defendant in question in Ruggiero, was charged in a RICO conspiracy count that alleged, as predicate acts, a pattern of subsidiary conspiracies, and in a RICO substantive count, which charged a corresponding pattern of substantive crimes. Santora was convicted on both counts. On appeal, the Court struck a legally defective predicate act charged only in the RICO conspiracy count.

verdicts, in fairness to the defendant we assume that the [stricken] predicate act was necessary to each verdict." Id.

* * *

The same conclusion is mandated here. Whatever the strength of the government's proof, it was the jury's function, and not the reviewing court's, to determine the factual issues in this case.[12] In straining to sustain petitioner's RICO conviction on the basis of a theory that the defendants had no opportunity to address, the Third Circuit violated the constitutional principle announced in Stromberg and reached a result that is contrary to decisions of

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[12] The sufficiency of the government's proof with respect to the surviving allegations in a challenged count determines only whether the defendant must be acquitted of that charge or can be retried, and not whether the jury's verdict can be sustained. See, e.g., Government of Virgin Islands v. Richards, 618 F.2d 242, 244-45 (3d Cir. 1980); United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977).

other circuits, on which the panel in Zauber purported to rely. This Court should grant certiorari to resolve such a conflict.[13]

Left undisturbed, the decision in Zauber will also have a profound effect on charging decisions by the government. Stripped of the mail and wire fraud allegations, the RICO conspiracy count in

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[13] In McCulloch v. United States, 108 S.Ct. 337 (1987), Justice White, joined by Justice Brennan, dissented from this Court's denial of certiorari in a RICO case in which the striking of several predicate acts left undisturbed the defendants' convictions on a series of corresponding substantive counts. See United States v. Cooper, supra, 639 F. Supp. at 182. Citing, among other cases, the Third Circuit's decision in United States v. Brown, supra, 583 F.2d 659, Justice White concluded: "Because of the disagreement and uncertainty among the Courts of Appeals over the proper application of this important federal criminal statute, I would grant certiorari to resolve the conflict." 108 S.Ct. at 338.

Here, where only one substantive count was held to be legally valid, the need for Supreme Court review is far more — compelling.

this case charges a pattern of racketeering activity consisting of a single criminal objective containing no particulars as to specific acts. By sustaining charges of this nature, the Zauber decision threatens to eradicate the distinctions between section 1962(d) and the general conspiracy statute. Petitioner was indicted for conspiring to violate the RICO statute; his conviction was upheld on appeal on the basis of findings that in effect establish a simple kickback conspiracy. Such a fundamental reworking of the RICO statute should be reviewed and rejected by this Court.

CONCLUSION

For the reasons stated above, and in the petitions of co-defendants Coard and Scotto, we respectfully request that a writ of certiorari be granted so

that this Court may consider the serious issues of federal law presented by this case.

December 16, 1988

Respectfully submitted,

SIDNEY H. STEIN
Counsel of Record
STEIN, ZAUDERER,
ELLENHORN, FRISCHER
& SHARP
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

ROANNE L. MANN
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5292, 87-5293 & 87-5294
Nos. 88-5244, 88-5245 &-88-5246

UNITED STATES OF AMERICA,

Appellee

v.

KENNETH P. ZAUBER,
Appellant at
Nos. 87-5292 & 88-5244

UNITED STATES OF AMERICA,

Appellee

v

ROBERT COAR,
Appellant at
Nos. 87-5293 & 88-5245

UNITED STATES OF AMERICA,

Appellee

v.

FRANK SCOTTO,
Appellant at
Nos. 87-5294 & 88-5246

Appeal from the United States District Court for the District of New Jersey

(D.C. Criminal Nos. 85-00332-03, 85-00332-04 & 85-00332-05)

Argued: April 13, 1988

BEFORE: BECKER, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed August 31, 1988)

Roanne L. Mann, Esquire (Argued)
Stein, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111
Attorney for Appellant Kenneth P. Zauber

Michael R. Perle, Esquire (Argued)
Hayden & Perle
80 River Street
Hoboken, NJ 07030
Attorney for Appellant Robert Coar

Robert E. Margulies, Esquire (Argued)
Clifford A. Herrington, Esquire
Margulies, Wind, Herrington & Katz
921 Bergen Avenue
Jersey City, NJ 07306
Attorneys for Appellant Frank Scotto

Samuel P. Moulthrop, Chief, Appeals Division
Marion Percell, Assistant U.S. Attorney (Argued)
U. S. Attorney's Office
970 Broad Street
Newark, NJ 07102
Attorneys for Appellee

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

I. *INTRODUCTION*

Appellants Robert Coar and Frank Scotto were indicted,[1] tried and convicted of mail and wire fraud pursuant to 18 U.S. C.A. §§ 1341 (West 1984) and 1343 (West 1984) and of conspiring to violate 18 U.S.C.A. § 1962(c) (West 1984) of the Racketeer Influenced Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C.A. § 1962(d) (West 1984) in the United States District Court for the District of New Jersey. Appellant Kenneth P. Zauber was convicted of mail fraud, RICO conspiracy and accepting kickbacks in connection with an employee pension benefit plan in violation of 18 U.S.C.A. § 1954 (West 1984) in the same court. All three were tried together. The district court denied their acquittal and new trial motions and sentenced them to prison terms and $25,000 fines. After they filed their appeal, the Supreme Court issued its decision in *McNally v. United States*, ___ U.S. ___, 107 S.Ct. 2875 (1987). Although *McNally* was not considered by the district court, we are bound to consider it on appeal. *United States v. Asher*, Nos. 87-5096 & 87-5213, slip op. at 8 (3d Cir. July 20, 1988); *see also Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708, 716 (1987) (new constitutional rules to be applied retroactively to all criminal cases on direct review or not otherwise final, with no exception when new rule is "clear break" with past). Because we find that the indictment fails to sufficiently allege mail and

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1. David Friedland, also named in the indictment, remained a fugitive until his arrest in the Maldive Islands in December, 1987.

wire fraud violations under *McNally*, we will vacate appellants' mail and wire fraud convictions and dismiss those portions of the indictment that charge §§ 1341 and 1343 violations. As to the remaining RICO conspiracy and § 1954 convictions, we will affirm and remand to the district court for resentencing.

II. *FACTS*

Coar and Scotto were lifetime trustees of the International Brotherhood of Teamsters, Local 701's employee pension benefit plan ("pension fund"). Zauber replaced David Friedland as general counsel to the pension fund in 1979.[2] Friedland was convicted in 1980 of receiving kickbacks in connection with a loan of pension fund monies.

In the spring of 1982, Friedland and Joseph Higgins[3] agreed to try to obtain money from the pension fund to invest in Higgins's Omni Funding Group ("Omni"), a Florida-based mortgage company.[4] Because of his earlier conviction, Friedland was to be a hidden partner in Omni. Friedland told Higgins that he would discuss the matter with Coar and Scotto, who trusted him. Friedland later reported back to Higgins they would have to pay kickbacks to Coar and Scotto to obtain the money.

Higgins mailed an investment proposal to the pension fund in June, 1982. His letter was the basis

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2. Zauber and Friedland were childhood friends. Jt. App. at 2028.

3. Higgins was dropped from the original indictment after he agreed to cooperate with the government and pled guilty to several counts.

4. Omni was formed by Higgins in 1981. Its total gross receipts in that year were only $1,250. Higgins, also an attorney, had known Friedland since 1966, when they were both members of the New Jersey legislature.

for a mail fraud count against Friedland, Coar and Scotto. After a formal presentation, Higgins and the trustees entered into negotiations. Zauber conducted a superficial "due diligence" investigation into Higgins and Omni, and reported favorably on them. At some point pension fund manager Alfred Piperata became suspicious of Higgins and conducted his own investigation. His inquiry revealed Higgins's prior bankruptcy, IRS and repossession problems, as well as his long-time friendship with David Friedland. When Piperata expressed concern to the appellants, he was told not to worry about it.

Higgins testified that sometime after the presentation, he, Friedland, Coar and Scotto had a meeting at a New York restaurant called "Paul and Jimmy's." The purpose of this meeting was to give Coar and Scotto an opportunity to "look over" Higgins and discuss the Omni investment in general.

In October, 1982 Higgins and the pension fund entered into a formal contract. The pension fund agreed to transfer $20,000,000, presently invested with the Magten Asset Management Corporation ("Magten"), to Omni for a thirty-year period. On this investment the pension fund was to set a return 1% higher than the six-month treasury bill rate on residential mortgages and 2% over the treasury rate on commercial mortgages. Omni was to retain any profit above those rates. Commercial loans using pension funds could not exceed 10% of the corpus. Residential loans were to require 100% insurance, and commercial loans 15% insurance. The contract also contained express provisions barring individuals with prior convictions, like David Friedland, from any involvement in Omni. Zauber's fiance, an associate at a Wall Street law firm, "independently" reviewed the contract.

The $20,000,000 was transferred to Omni in two separate transactions, $15,000,000 by wire and

$5,000,000 by mail. These transactions formed the basis for mail and wire fraud counts against Friedland, Coar and Scotto.

In late November, 1982, Omni was having trouble obtaining insurance on the loans. Higgins proposed changing the investment contract to allow for a 15% holdback on each loan in lieu of insurance or a letter of credit. By letter of December 6, 1982, Zauber approved Higgins's proposed interpretation of the contract. This letter was the basis of a mail fraud count against Zauber and Friedland.

Higgins testified that he, Coar, Scotto and Friedland had a second lunch meeting at "Paul and Jimmy's" sometime in late 1982. At that meeting, Friedland requested that all communications between Omni and Coar and Scotto be made through him, rather than Higgins. Friedland also discussed kickbacks and told Coar and Scotto that their share would come from his half of Omni's profits.

At trial, Higgins testified that Zauber approached him for money on at least six separate occasions beginning in late 1982.[5] Higgins repeatedly directed Zauber to Friedland and gave Friedland money to pay off Zauber, Coar and Scotto.[6]

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5. Higgins testified that Zauber approached him for money "for expenses" in late 1982 and January 1983, at Zauber's wedding on Valentine's Day, 1983, at a Zauber family gathering in 1983, at a jewelry store in Florida on June 8, 1983 and at the Sheraton Hotel at Newark Airport in April 1984. Jt. App. at 1464-1511. Each time, Higgins told Zauber to contact Friedland for the money.

6. At trial the government introduced evidence that Zauber and his wife were in the process of building a home between August 1983 and late 1984/early 1985 and that they made several large cash payments directly to the architect and general contractor, totalling $115,000. Zauber introduced evidence that his architect advised him to pay in cash to get a better price on the construction and that the money came from bank loans and the sale of other properties.

In January of 1983, four new trustees joined Coar and Scotto on the board of the pension fund.[7] The new trustees were told that the "old" trustees would be solely responsible for any liability on prior investments and would continue to monitor them. In late 1983, however, the new trustees learned this was incorrect and became aware of their own responsibility, as fiduciaries, for continuing investments made by the fund. They also learned that the Magten investment was paying 17% while Omni was paying approximately 9% overall. The new trustees began their own investigation into Omni. After a trip to Florida to learn more about Omni, they discovered that Omni had been violating the investment contract by making loans in excess of the 10% corpus limit. Higgins, Friedland and Zauber attempted to cover up these loans by backdating a letter from Zauber authorizing loans in excess of the 10% limit. The new trustees also discovered that many of Omni's loans were in default, and that Omni was making interest payments to the pension fund from the 15% holdback accounts in violation of the investment contract. After the Department of Labor initiated an investigation, Coar and Scotto resigned from the board, Zauber was fired, and the new trustees terminated the pension fund's investment contract with Omni.

III. *THE McNALLY ISSUES*

A.

The mail fraud statute, 18 U.S.C.A. § 1341, provides, in pertinent part:

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7. The new trustees joined the board pursuant to a settlement agreement in a civil lawsuit between the union and trustees Coar and Scotto. The union lawsuit attacked the lifetime tenure of Coar and Scotto and sought an increase in the number of trustees from two to six.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attemptting to do so, [mails, receives in the mail or causes the mails to be used] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The wire fraud statute, 18 U.S.C.A. § 1343, employs similar language and applies to the use of transmissions by wire, radio, or television communication in interstate or foreign commerce to further a scheme to defraud.[8] Because the district court did not review the indictment for a *McNally* deficiency, our standard of review is plain error. Fed.R.Crim.P. 52(b). The same standard of review and analysis apply to both fraud statutes. *Carpenter v. United States*, ___ U.S. ___, 108 S.Ct. 316, 320 n.6 (1987); *United States v. Evans*, 844 F.2d 36, 37 (2d Cir. 1988).

On review of defendants' mail and wire fraud convictions, we must look to see whether the indictment alleged, and the jury was charged, that the

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8. The wire fraud statute provides, in its entirety:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 1343.

pension fund suffered a loss of money or property. *McNally*, 107 S.Ct. at 2882; *Asher*, slip op. at 27-28. Allegations of lost "intangible" rights are insufficient, without more, to support an indictment charging violations of the mail and wire fraud statutes. Intangible rights include the public's right to have government officials perform their duties honestly. *McNally*, 107 S.Ct. at 2881. They also include an employer's right to the honest and faithful services of its employees. Purely intangible rights are contrasted with rights in intangibles which nevertheless constitute "property." *See Carpenter*, *supra* (newspaper's financial information, misappropriated by reporter prior to publication, constituted loss of property to newspaper for purpose of mail and wire fraud statutes).

B.

We first review the indictment to see if it charged the defendants with committing acts which caused a money or property loss to the pension fund. The redacted indictment[9] contains six counts. Count One alleges a RICO conspiracy, based on predicate acts of mail and wire fraud and § 1954 kickback violations, involving all of the defendants. Counts Two through Five involves substantive mail and wire fraud charges. Count Six charges Zauber with a violation of 18 U.S.C. § 1954, receiving kickbacks with intent to be influenced with respect to an employee benefit plan. The indictment is set out in its entirety in the Appendix to this opinion.

Count One paragraphs (2)(a) and (b) charge the defendants with conspiring "to defraud the Pension

9. The redacted indictment was actually the third superceding indictment returned by the grand jury against Friedland, Zauber, Coar and Scotto and was redacted by the district court from ninety counts to six.

Fund and its Beneficiaries of money and property and of the right to honest, faithful, prudent and diligent services by its employees -- all relating to the Pension Fund's dealings with Omni, and to the manner in which Omni would invest and otherwise handle said $20,000,000 in Pension Fund assets," in violation of 18 U.S.C. §§ 1341 and 1342. Paragraph (3) charges that this conspiracy was carried out by accepting kickbacks from Omni profits, acquiescing in Friedland's illegal participation in Omni, concealing the holdback accounts and delinquent loans from the pension fund, issuing loans in excess of the 10% lending limit without pension fund approval, and in general making expressly prohibited and otherwise imprudent loans and then "thwarting discovery" by trying to cover up their tracks from the new trustees. There is no allegation of an actual money or property loss to the fund itself.

Count One paragraph (4) describes the racketeering acts which made up the conspiracy. These acts consisted of the mail and wire fraud charges, also charged separately in Counts Two through Five, and the § 1954 violations. Here, however, the government only charges the defendants with a scheme "to defraud the Pension Fund, and the beneficiaries thereof, of the right to honest, faithful prudent and diligent services by the Pension Fund's fiduciaries and employees." *See* Count One ¶¶(4)(1)(a), (b), (4)(2)(a) and (4)(3)(a). Paragraph (4) does not allege a money or property loss to the fund.

C.

In construing an indictment, we will not strain to interpret a defective indictment as implicitly alleging that the kickback scheme's purpose was to deprive the pension fund beneficiaries of money. *United States v. Davis*, No. 86-4076 (6th Cir. March 8, 1988)

(WESTLAW, Federal Library, CTA 6 file) (per curiam) (citing *United States v. Heller*, 579 F.2d 990, 999 (6th Cir. 1978)). In *United States v. Baldinger*, 838 F.2d 176 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit considered whether an indictment alleging that the defendant acted to discredit a competitor's business qualifications, thereby defrauding the competitor "'of [its] right to conduct business free of false, fictitious and fraudulent information,'" constituted a violation of the mail fraud statute under *McNally*. On appeal the government argued that its theory *really* involved an appropriation of the competitor's "good will," a valid intangible property right within *Carpenter*. *Id.* at 179. Although the Sixth Circuit found some evidence supporting this theory on which the jury could have based its verdict, the indictment itself was dismissed because it failed to allege such a theory:

> One of the principal purposes of an indictment is to inform the defendant of that which he is called upon to defend. The indictment here gave no warning . . . that [the defendant] might be accused of appropriating [the victim's] good will. It is therefore obvious that it would be unduly prejudicial to [the defendant] to uphold his conviction on an economic benefit ground when this issue was not fully presented at trial.

Baldinger, 838 F.2d at 181.

Counts Two through Five, the mail and wire fraud violations, incorporate the RICO conspiracy count by reference and charge the defendants with scheming to defraud the pension fund "of the right to honest, faithful[,] prudent and diligent services of [its] employees." These counts do not allege a money or property loss to the pension fund; instead, they rely solely on the loss of intangible rights. Under *McNally*

Counts Two through Five fail to charge the defendants with conduct violating 18 U.S.C.A. §§ 1341 and 1343. They are insufficient and must be dismissed. *See United States v. Markus*, 721 F.2d 442, 444 (3d Cir. 1983)(each count in indictment is separate); *see also United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980) ("Each count must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated."), *cert. denied*, 449 U.S. 839 (1980). "It is settled law that 'nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found.'" *Markus*, 721 F.2d at 444 (quoting *United States v. Norris*, 281 U.S. 619, 622 (1930)).

D.

This leaves us with those parts of Count One's RICO conspiracy charge which are based on predicate acts of mail and wire fraud.[10] Count One does allege a scheme to defraud the pension fund of money or property in general terms. Count One ¶ 2(a),(b). "In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating." *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987). In *United States v. Castor*, 558 F.2d 379, 385 (7th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), the Court of Appeals for the Seventh Circuit held that the government need not allege evidence showing a causal relation between the alleged mailings and the scheme to defraud for the indictment to stand. Such "subordinate" evidence need not be included in the indictment "unless there is no conceivable evidence that the Government could produce at trial to substantiate its [causation] allegation." *Id.*

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10. Count Six does not allege mail or wire fraud and is therefore not implicated in this discussion.

In this case, if the government had presented the grand jury with charges based on a money or property loss theory, and presented the grand jury with evidence to support that theory, we might be persuaded that the indictment for RICO conspiracy insofar as it was based on predicate acts of mail and wire fraud was sufficient, even without allegations of actual money or property losses to support the theory. However, we have carefully reviewed the government's submissions and find no indication that it proceeded on such a theory. It is clear that the grand jury indicted the defendants for scheming to deprive the pension fund of its right to its employees' "honest, faithful, prudent and diligent services" by receiving kickbacks. Furthermore, the government conceded at oral argument that it was impossible, even at the time of trial, to know whether the pension fund suffered any actual losses.

As we stated in our recent opinion in *Asher*, post-*McNally* cases can be separated into those where the convictions were upheld because the fraudulent scheme resulted in a money or property loss and those where the conviction was based entirely on an intangible rights theory and the jury instructions "could not assure that money or property interests were implicated," necessitating a reversal under *McNally* principles. *Asher*, slip op. at 14. This case is in the latter category. Although Count One of the indictment alleges a money or property loss, it is clear that the mail and wire fraud charges were based, and the jury solely instructed on, an intangible rights theory.

Our conclusion is supported by the trial and jury charge in this case. Review of the record demonstrates that the government's theory throughout the trial was that the defendants committed mail and wire fraud by scheming to defraud the pension fund by receiving kickbacks from Omni's profits. We find no evidence

that the government could or did show that the pension fund lost money, either from its corpus or Omni's guaranteed rate of return. There was also no evidence that use of the holdback accounts to pay interest or any of the failed loans caused a loss to the pension fund.

Even more revealing are the government's requests to charge and the jury charge itself. The government's requested charges for the mail and wire fraud statutes deleted the "or for obtaining money and property" language and simply read, "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme." Jt. App. at 811. The scheme to defraud involved "defrauding of the Pension Fund of its right to the honest and faithful services of the defendants." Jt. App. at 814. That scheme, the charge alleged, constituted a crime under the mail and wire fraud statutes. *Id.*

At the charging conference, in defense of the requested charges, counsel for the government Stanley R. Chesler argued that a kickback scheme is an intangible rights fraud:

MR. CHESLER: Now we have mail frauds based upon kickbacks, also.

MR. HAYDEN: (representing defendant Coar): We're not talking about intangible rights. It's not in your indictment.

MR. CHESLER: It certainly is intangible rights.

MR. HAYDEN: Your indictment is kickback scheme, you can't change your indictment. That's the indictment we're trying. It's kickback scheme, Stanley.

MR. CHESLER: A kickback scheme is still an intangible rights fraud.

Jt. App. at 947.

Finally, our review of the district court's jury charge reveals that the jury was never asked to find a money or property loss under the indictment:

> In order to establish a scheme to defraud, the government is not required to establish that the defendant himself originated the scheme to defraud. Nor is it necessary that a defendant realize any gain from the scheme, nor that the intended victim suffered any loss.
>
> . . .
>
> Members of the jury, there was some mention . . . as to the victims, victims of the alleged crimes charged here as being the pensioners of the Local 701 pension fund. I hereby charge you that it is *absolutely irrelevant* whether or not there was any loss in pension benefits, as well as whether or not the pension fund is presently financially strong. The sole issue before you is whether or not the defendants have been proven guilty of the crimes charged beyond a reasonable doubt.

Jt. App. at 1009, 1020. (emphasis added).

This case is therefore distinguishable from *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2014 (1988). In *Piccolo* we concluded that the district court's jury instruction[11] implicitly required the jury to find that the object of the scheme was to defraud the victim of money before it could find that the victim was also defrauded of its

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11. The *Piccolo* instruction required the jury to find "that the defendant devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, . . . *and further, to defraud both United Engineers and Delmarva Power and Light Company of money.*" *Piccolo*, 835 F.2d at 520 (emphasis in original).

right to the honest, faithful and loyal services of its employee. *Piccolo*, 835 F.2d at 520. Since the district judge instructed the jury that the government must prove both beyond a reasonable doubt, we found no reversible error. Unlike *Piccolo*, in this case the jury was clearly instructed solely on an intangible rights theory. The record convinces us that, despite the "money or property loss" language in Count One of the indictment, that indictment did not, and in fact could not, charge an actual money or property loss to the pension fund caused by the defendants.

E.

The government makes a vain effort to preserve Counts Two through Five of the indictment as well as the parts of Count One which are predicated on mail and wire fraud. These charges were crafted long before the Supreme Court's decision in *McNally*.

They first argue that the kickbacks constituted a loss of property to the pension fund. Although the money for the kickbacks came from Omni investment profits, the government argues that the defendants had a fiduciary duty to turn over any bribe to the principal, since that bribe is of value to the principal and therefore the taking of such a bribe is the taking of something of benefit to the principal. The government relies heavily on *United States v. Runnels*, 833 F.2d 1183 (6th Cir. 1987). That case, which relied on a constructive trust theory to show a money loss, has since been vacated pending rehearing *en banc*. *See United States v. Runnels*, 842 F.2d 909, 912 (6th Cir. 1988) (order granting rehearing *en banc* and vacating previous opinion and judgment). Recent Sixth Circuit decisions intimate that the *Runnels* fiduciary duty theory is in trouble. *See United States v. Davis*, *supra* (remanded to dismiss indictment for failure to charge deprivation of money or property); *see also United*

States v. Baldinger, *supra* (same). Moreover, the constructive trust theory has been flatly rejected by the Seventh Circuit; *see United States v. Holzer*, 840 F.2d 1343, 1347-49 (7th Cir. 1988). We too reject it as inconsistent with *McNally*.

F.

Again, with respect to Counts Two through Five and the parts of Count One predicated on mail and wire fraud, the government argues that the pension fund suffered an actual loss due to missed investment opportunities. It argues that the Omni investment realized only half as much as the pension fund monies handled by Magten, and that defendants' removal of $20,000,000 of pension fund monies from Magten and subsequent investment of that money in Omni caused an actual loss of many hundreds of thousands of dollars to the pension fund.[12]

The problem with this argument is that although the Omni investment may have been unwise, it still returned exactly what the investment agreement called for: a 2% return over the six month treasury bill rate on commercial mortgages and 1% over the treasury bill rate on residential mortgages. There is no evidence that Omni failed to pay the guaranteed return. We fail to see how the defendants could have predicted such a large scale drop in the treasury bill rate. We do not believe that a lost investment opportunity, without proof of an actual loss of a guaranteed investment return, can qualify as an "actual loss" for purposes of the mail and wire fraud statutes.

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12. The government bases this assertion on a large scale drop in the treasury bill rate after the initial pension fund investment of $20,000,000 with Omni. According to the government, at one point Magten was paying a 17% return while Omni was only paying an overall 9% return.

G.

Finally, with respect to mail and wire fraud, the government argues that the defendants deprived the pension fund of control over its money. It argues that a deprivation of control over how money is spent can constitute an actual loss of money or property. It cites *McNally* and *Carpenter* in support of this argument.

In *McNally* one of the defendants, a public official responsible for selecting insurance agencies for the state of Kentucky's insurance needs, received commissions from the insurance companies. In reversing defendants' mail fraud convictions, the Supreme Court observed that the jury was not:

> charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what [defendants] did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.

McNally, 107 S.Ct. at 2882. The Court further observed:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it. But if state law expressly permitted or did not forbid a state officer such as [defendant] to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that

> having and concealing such an interest defrauds the State and is forbidden under federal law.

McNally, 107 S.Ct. at 2882 n.9. The opinion can be read as dismissing the loss of control argument on the narrow ground that the jury was not instructed that it could convict the defendants under such a theory. Footnote nine suggests, however, that such a theory is too amorphous to constitute a violation of the mail fraud statute as it is currently written.

In *Carpenter* the Supreme Court held that a reporter's use of his newspaper's confidential information for his own personal gain violated the mail and wire fraud statutes. In that case the petitioner argued that his use of prepublic information was merely a violation of workplace rules and did not constitute fraudulent activity within the meaning of the mail fraud statute. The Supreme Court looked to the following definitions and concluded that petitioner's use of the Wall Street Journal's prepublic information was fraud:

> As we observed last Term in *McNally*, the words "to defraud" in the mail fraud statute have the "common understanding" of "'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U.S. at ___, 107 S.Ct., at 2881 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The concept of "fraud" includes the act of embezzlement, which is "'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Grin v. Shine*, 187 U.S. 181, 189 (1902).

Carpenter, 108 S.Ct. at 321. In *Carpenter* the petitioner appropriated the information for his own

use. Webster defines "appropriate" as "to take exclusive possession . . . to set apart for or assign to a particular purpose or use . . . to take or make use of without authority or right." Webster's New Collegiate Dictionary 56 (1977 ed.).

Carpenter is distinguishable from the facts in this case. We have sought, in vain, to find an actual money or property loss to the pension fund. In this case defendants Coar and Scotto, as trustees of the pension fund, had the power and the authority to invest the fund's monies with others. We fail to see what the defendants "appropriated" in this case. The investment with Omni provided its guaranteed rate of return. Neither that return nor the corpus itself suffered a loss. The alleged kickbacks were paid with Omni's profits, not the pension fund's. *See United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) (deceived party must show it had some money or property loss).

As the Supreme Court reiterated in *McNally*, "'[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" *McNally*, 107 S.Ct. at 2881 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)); *see also Evans*, 844 F.2d at 42 (applying rule of lenity in rejecting government's theory that its right to control the transfer or resale of United States military weapons from one foreign country to another is a property right within *McNally*). The charge in the indictment that defendants acted against the interest of the fund does not state a violation of the mail and wire fraud statutes as they are currently written. The charge that defendants concealed their activities in order to leave the money with Omni likewise fails to allege a violation of the mail and wire fraud statutes. The charges that defendants violated the investment contract by approving inadequately collateralized and imprudent loans and using holdback accounts to pay

overdue interest also fail to allege a violation of the mail and wire fraud statutes. None of these alleged actions caused a loss to the pension fund. Therefore, Count One parts 2(a),(b), 4(1)(a),(b), 4(2)(a),(b), 4(3)(a),(b) will be stricken and Counts Two through Five of the indictment will be dismissed.[13]

IV. *THE RICO CONSPIRACY AS PREDICATED ON KICKBACKS*

A.

Our next inquiry necessarily must be whether the remaining parts of Count One sufficiently allege a RICO conspiracy. With those remaining parts, Count One alleges that appellants conspired "to conduct and to participate directly and indirectly in the conduct of the affairs of Omni through a pattern of racketeering activity," thereby violating RICO, 18 U.S.C.A. § 1962(d).[14] Count One, ¶ 2. The "pattern of racketeering activity" which remains consists of multiple § 1954 violations. Section 1954 makes it illegal for persons involved in the operation of an employee pension benefit plan to receive or solicit kickbacks in exchange for their influence in those

13. Because we are dismissing Count Five, we find it unnecessary to address Zauber's argument that the evidence was insufficient to show that he had joined the kickback scheme by December 6, 1982, when the holdback letter was mailed.

14. Section 1962(d) makes it a crime, *inter alia*, to conspire to violate § 1962(c) which provides, in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C.A. § 1962(c).

operations.[15] Count One alleges that the appellants "would, on multiple occasions [sic] solicit, agree to receive, and actually receive certain kickbacks." Count One ¶'s 2(c), 4(1)(c), 4(2)(c).

B.

Appellants raise several arguments in support of their position that Count One is insufficient to allege a RICO conspiracy. First, they argue that the grand jury indictment alleges the § 1954 violations as one racketeering act. They say that without the mail and

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15. Section 1954 provides, in pertinent part:

> Whoever being --
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
>
> (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan
>
> receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both . . . .

18 U.S.C.A. § 1954.

wire fraud charges, there is only one racketeering act and a single act cannot support a RICO charge. This argument has superficial appeal. The indictment contains only one § 1954 charge for each appellant under the "racketeering acts" section, in paragraph four. However, the charges allege "multiple" solicitations, agreements to receive and receipt of kickbacks by the appellants. Each violation of § 1954 constitutes a separate act of racketeering activity. *See* 18 U.S.C.A. § 1961(1)(B). Furthermore, the individual appellants need not personally commit each racketeering act; they need only agree to commit it for purposes of a RICO conspiracy. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985). The remaining portions of Count One of the indictment allege that Coar and Scotto agreed to receive, and did receive on multiple occasions, a share of Omni's profits in exchange for the pension fund investment. Count One ¶ 3(a). They also allege that Zauber "regularly" solicited kickbacks from Friedland and Higgins. These allegations satisfy the Supreme Court's interpretation of the term "pattern" in the RICO statute as requiring at least two, and probably more than two, acts of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

C.

Appellants next argue that these allegations do not satisfy *Sedima*'s "continuity plus relationship" requirement. *Id.* In *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3d Cir. 1987) we held that a single illegal scheme could constitute a "pattern of racketeering activity," so long as the racketeering acts met the "continuity plus relationship" requirement. A combination of specific factors, "such as the number of unlawful acts, the length of time over which the acts

were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity" could be considered in determining whether a pattern existed. *Id.* at 39.

We applied *Barticheck* in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988). In that case the defendant, a company which sold aircraft equipment and facilities, obtained a Nigerian Air Force contract by offering a "sales commission" of 20% of the contract price to Nigerian political and military officials. The contract was paid in four installments, after each of which the defendant transferred a portion of the promised commissions to the appropriate recipients. Although the bribe could be considered "a single illegal payment separated into installments," we focused on the factors listed in *Barticheck*. *Environmental Tectonics*, 847 F.2d at 1063. The complaint alleged a complex bribery scheme involving predicate acts of mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act. *Id.* The scheme was organized by two American corporations and a European conglomerate. *Id.* They hired a consultant who developed a complicated process to deter detection of the bribes. *Id.* The alleged acts harmed other companies bidding for the Nigerian contract, as well as the citizens of Nigeria. *Id.* Based on these factors, we found that the complaint sufficiently alleged a RICO pattern. *Id.* at 1064.

The scheme in this indictment is admittedly more simple than those involved in *Environmental Tectonics* and even *Barticheck*. However, we believe the indictment sufficiently alleges a RICO pattern under the test set out in *Barticheck*. All three of the appellants solicited kickbacks in exchange for their help in obtaining a $20 million investment for Omni. Appellant Zauber "repeatedly" approached Higgins for kickbacks. Appellants' actions evidenced an attempt to

hide the details of the Omni investment from the new trustees. The scheme allegedly began in March of 1982 and continued until appellants were indicted in September of 1985. The Omni investment contract provided for a thirty year investment, indicating that the scheme was open-ended. Although "open-endedness" is not a requirement under *Barticheck*, it is certainly a factor to be considered in determining whether a pattern meets *Sedima*'s "continuity" requirement. *Barticheck*, 832 F.2d at 39. The victims of the scheme included all the members of the pension fund who were relying on the appellants to wisely invest their hard-earned retirement monies. All of the alleged solicitations, agreements to receive and actual receipt of kickbacks were for the purpose of obtaining appellants' influence in exercising their powers over pension plan funds. The acts all involved one particular investment.

This indictment is distinguishable from the insufficient complaint in *Marshall-Silver Constr. Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987). In that case a dispute arose when the plaintiff, a general contractor, withheld payment from a subcontractor, Barton Engineering Co. (Barton) for poor work quality and late performance. Defendants, who were shareholders and officers at Barton, were unsuccessful in obtaining payment from plaintiff. Defendants filed a petition in Bankruptcy Court requesting that plaintiff be placed in involuntary bankruptcy. The media reported that plaintiff was bankrupt and, as a result, plaintiff lost business and finally folded. Plaintiff alleged in its civil RICO complaint that the defendants knowingly made false allegations in the bankruptcy petition and caused plaintiff's loss of business and ultimate downfall.

We found that this complaint failed to allege a pattern of racketeering activity:

> The target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time. Here we have a single victim, a single injury, and a single, short-lived scheme with only two active perpetrators. This is not criminal activity with the kind of continuity of which we spoke in *Barticheck*.

Marshall-Silver, 835 F.2d at 66-67 (footnote omitted).

D.

Finally, appellants argue that the indictment fails to properly charge an "enterprise" and that appellants were not "associated with" Omni, in that they did not "conduct or participate, directly or indirectly, in the conduct of [Omni's] affairs through a pattern of racketeering activity." 18 U.S.C.A. § 1962(c). The indictment identifies Omni as the enterprise. Count One ¶ (1)(e). It alleges that appellants "were associated with Omni in that each . . . would and did solicit, agree to receive and in fact received concealed payments from the profits which Omni would and did make through the [investment] agreement with the Pension Fund." Count One ¶ (1)(j).

Appellants' central argument on this issue is that they were unaware that Omni was making loans in violation of the investment contract and using the holdback accounts of loans in default to make interest payments to the pension fund. That, however, is irrelevant. Appellants participated indirectly in the conduct of Omni's affairs by providing Omni with $20 million in capital.[16] The racketeering activity was the

16. The pension fund was the only source of Omni capital. Apparently no other company invested in Omni, nor did Omni seek investments from any source other than the pension fund.

receipt of kickbacks in exchange for the pension fund investment. Appellants may not have participated in what loans Omni made and to whom, but they made those loans possible by providing Omni with $20 million. This supports the allegation that appellants participated indirectly in the conduct of Omni. For RICO conspiracy purposes, "[i]t is well-established that one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." *United States v. Riccobene*, 709 F.2d 214, 225 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *see also United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir. 1984) (government must show person enabled to commit predicate offenses solely by virtue of his involvement in enterprise, or that predicate offenses are related to enterprise's activities), *cert. denied*, 469 U.S. 880 (1984); *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) (RICO violations dependent upon behavior, not status in enterprise). We find, therefore, that the remaining allegations in Count One of the indictment sufficiently allege an 18 U.S.C. § 1962(d) violation.

V. *THE REDACTION OF THE INDICTMENT*

Appellants next argue that the massive redaction of the third superceding indictment from ninety counts to six violates their Fifth Amendment right to be tried on an indictment returned by a grand jury and their Sixth Amendment right to be informed of the nature of the crime so that they may adequately prepare a defense.

This issue is controlled by *United States v. Miller*, 471 U.S. 130 (1985). In *Miller* the defendant was charged with three counts of mail fraud in connection with a burglary of his business premises. Before trial,

the government moved to strike the count that alleged prior knowledge of the burglary. The defendant was tried and convicted of fraudulently inflating the value of his property loss to his insurer. On appeal, the defendant argued that the fatal variance between the indictment returned by the grand jury and the scheme proved at trial violated his Fifth Amendment grand jury guarantee. The Court of Appeals for the Ninth Circuit agreed and vacated his conviction. The Supreme Court reversed. The Court first found that the indictment gave the defendant "clear notice" that he would have to defend against the offenses charged in it. Therefore, he could not be prejudiced by the absence of evidence at trial of his alleged planning in the burglary. The Court also found the indictment sufficient to allow the defendant to plead it as a bar against future double jeopardy problems. Finding that these "notice related concerns" were met, the Court stated:

> As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime. Indeed, a number of longstanding doctrines of criminal procedure are premised on the notion that each offense whose elements are fully set out in an indictment can independently sustain a conviction. . . . Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment. A part of the indictment unnecessary to and independent from the allegations of the offense proved may normally be treated as "a useless averment" that "may be ignored."

Miller, 471 U.S. at 136 (citations omitted). The Court rejected *Ex parte Bain*, 121 U.S. 1 (1887) to the extent that it supports the proposition that an unconstitutional amendment occurs when allegations are dropped from an indictment. Such a change is constitutional, so long as the remaining offense is clearly set out in the original indictment. *Id.* at 144. The unconstitutional amendment occurs when impermissible *additions* are made to the indictment during trial.

Such is not the situation here. Although the case was tried on a ninety count indictment and redacted to six counts prior to the jury charge, the remaining counts sufficiently allege RICO conspiracy and § 1954 offenses against the appellants, as we discussed *supra*. Even as further redacted by our *McNally* analysis, *supra*, the indictment alleged, and always alleged, these violations. They are clearly set out in separate counts of the indictment. The charges put appellants on notice that they would have to defend against RICO conspiracy and § 1954 allegations. Although the ninety count third superceding indictment alleged "more crimes or other means of committing the same crime," they evolved into "useless averments" to the essential RICO and § 1954 violations alleged in the indictment.

VI. *THE JURY VERDICT*

Appellants argue that the jury's general verdict on Count One "does not reveal the number or nature of predicate acts" on which the jury relied in finding appellants guilty of conspiring to violate RICO. Therefore, they argue, the RICO convictions must be reversed under our decision in *United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) and a recent Seventh Circuit decision, *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988).

If an appellate court is in doubt as to whether a defendant's conviction rests on an impermissible ground, the conviction should be vacated and a new trial ordered. *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In *Brown* we reversed defendants' convictions on two counts of mail fraud for insufficient evidence. We therefore reversed defendants' RICO convictions, because we could not determine whether the jury relied on those findings of guilt in its guilty verdict on the RICO count. Similarly, in *Holzer* the Seventh Circuit vacated the defendant's RICO conviction because it could have been based on mail fraud violations invalid under *McNally*.

This case differs from *Brown* and *Holzer*. Here, the jury had to find kickbacks in order to convict appellants under Count One. They were instructed:

> The indictment charges and the government must prove beyond a reasonable doubt that the defendants Coar, Scotto and Zauber "were associated with Omni in that each said defendant would and did solicit, agree to receive and in fact received concealed payments from the profits which Omni would and did make through the aforesaid agreement with the pension fund." No defendant may be convicted of Count 1 unless you find beyond a reasonable doubt that he was associated with Omni in this way.

Jt. App. at 991-92. At defense counsels' insistence, the jury was charged that they must find a kickback scheme to convict defendants of RICO conspiracy, and that the kickback scheme was *facilitated* by mail and wire fraud. Jt. App. at 990. Regarding the substantive mail fraud charges in Counts Two and Four, the jury was specifically charged that the government must prove beyond a reasonable doubt:

> 1. A mailing for purposes of executing a scheme to defraud the pension fund. These counts specifically incorporate by reference allegations in the indictment as to an agreement by Coar, Scotto and Zauber to receive illegal cash payments and hence you must find that the mailing was in furtherance of a kickback scheme.
>
> 2. The defendants acted with a specific intent to defraud and engage in the fraud scheme.
>
> 3. The defendants did knowingly and wilfully [sic] cause the mailing pursuant to their scheme.

Jt. App. at 1006-07. The court gave the same instructions on the substantive wire fraud charge of Count Three, instructing the jury that "[t]his count specifically incorporates by reference allegations in Count 1 of the indictment as to an agreement by Coar and Scotto to receive illegal cash payments and hence you must find the wire transfer was in furtherance of a fraud scheme involving illegal cash payments." Jt. App. at 1007-08.

With respect to Count One, the jury was also instructed that each act in violation of § 1954 constituted an act of racketeering, and that each co-conspirator must merely agree to the commission, not personally commit, two or more of these acts. Jt. App. at 1001-02.[17] Therefore, the jury had to find at

17. During the district court's charge on the RICO conspiracy, the jury was instructed:

> To prove that a defendant was a member of the racketeering conspiracy charged in Count 1, the government need not prove that he agreed to personally commit or actually committed any racketeering acts. The

least three violations of § 1954 by convicting each defendant of RICO conspiracy.[18] *See United States v. Weisman*, 624 F.2d 1118, 1124-25 (2d Cir.) ("unlike the present case in which the conspiracy counts covered the substantive offenses charged in the [RICO] predicate acts, in *Brown* the substantive offenses

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government must prove that he agreed to the commission of two or more of those acts by any member of the conspiracy to further the criminal goals of the enterprise. Omni.

Jt. App. at 1000. After instructing the jury on "racketeering activity" and "pattern of racketeering activity," the district court reiterated, "[i]nsofar as each of the three defendants in this case is concerned, the government must prove beyond a reasonable doubt that he agreed to the commission of at least two of the racketeering acts charged as to him in paragraph 4 of Count 1." Jt. App. at 1002. While this latter instruction is ambiguous and could be read to imply that each defendant must agree to personally commit the racketeering act, we believe, based on the jury instructions as a whole, that this jury would not have so construed it. *United States v. Plaumer*, 774 F.2d 1224, 1233 (3d Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980), *cert. denied*, 450 U.S. 967, 450 U.S. 983 (1981). If it were construed to require the commission of at least two racketeering acts by each member of the conspiracy it would be erroneous. So construed, however, it prejudiced the government, not these defendants, and would be considered a harmless overcharge. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 274 (5th Cir. 1963). As such, it would not constitute plain error. *United States v. Piccolo*, 835 F.2d 517, 519 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988). Neither the government nor defense counsel objected to the charge. Jt. App. at 1021. "'[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Palmeri*, 630 F.2d at 201 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). The same analysis applies to the district court's intimation in its charge that the jury had to find actual receipt of concealed payments.

18. Zauber was also convicted separately of a § 1954 substantive violation under Count Six of the redacted indictment.

charged as predicate acts were distinct and hence it was arguably impossible to determine from the verdict which offenses the jury relied upon in finding a pattern of racketeering."), *cert. denied*, 449 U.S. 871 (1980). Under our RICO analysis, *supra* Section IV(B), this is enough to establish a § 1962(d) violation.

Evidence introduced at trial supports our analysis. There was evidence that Coar and Scotto solicited kickbacks from Friedland, and that kickbacks were discussed at the second lunch meeting at "Paul and Jimmy's."[19] Zauber directly solicited kickbacks from Higgins on at least six separate occasions, beginning in late 1982 and continuing until April of 1984. Higgins gave money to Friedland to pay off Coar, Scotto and Zauber. The Omni investment was set up for a period of thirty years. Based on Zauber's continuing requests for money, it is apparent that the solicitations would have continued except for the new trustee's discovery of the Omni loan defaults and subsequent termination of the pension fund investment.

Other circumstantial evidence supports the inference that all of the appellants were involved in a kickback scheme. Several pension fund officers testified that the appellants actively sought to conceal the illicit Omni investment scheme. Alfred Piperata, pension fund manager, specifically recalled that Scotto called him on approximately July 12, 1983 in regard to the Omni investment proposal letter which Piperata had placed, as was his custom, in a file with other such letters. Supplementary Appendix (Supp. App.) at 29-30. Scotto scolded Piperata for not having brought the letter to the trustees' attention and directed him to

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19. We note that there is no direct evidence that any of the defendants actually received any kickback payments. Judge Gerry acknowledged this at the sentencing hearing. He also correctly noted that, with respect to conspiracy, actual receipt was not "an essential or necessary finding of the jury." Jt. App. at 1108.

nvite Higgins to the next board meeting to make a ormal presentation. *Id.* at 30, 32. When Piperata's own nvestigation into Higgins revealed a poor business reputation, including IRS and bankruptcy problems, Scotto told him that he was overly concerned and that "[i]f there's anything wrong we'll take care of it." *Id.* at 70. Coar told Piperata "he had heard all the innuendos he intended to hear and was not going to call anybody" to check into Piperata's allegations. *Id.* at 59. Zauber reacted angrily to Piperata's report that Higgins was a long-time friend of David Friedland, accusing Piperata of having a "state police mentality." *Id.* at 57. When the new trustees joined the board in January of 1983, they were told by Scotto and Zauber that "anything that happened prior to January 1, 1983 was not their problem." *Id.* at 96.

Rocco Morongello testified that Scotto told him and the other new trustees that they were not responsible for investments made prior to January of 1983. *Id.* at 115. He also testified that Zauber gave Piperata a memorandum indicating that only the trustees who entered into the Omni investment were responsible for it as fiduciaries. *Id.* at 116.

When the new trustees found out that they were liable as fiduciaries, they travelled to Florida in January of 1984 to learn more about Omni and found that loans made by Omni had exceeded the 10% corpus limit. Higgins testified that during their visit he drafted a letter, predated December 9, 1982, which Zauber signed in Higgins's Florida office, authorizing such loans. *Id.* at 170-73, 179. Testimony showed that Coar and Scotto told the new trustees that they had authorized the letter in 1982 and that Scotto had a copy of it in his files. *Id.* at 110-11, 128. When the new trustees were advised to terminate the Omni investment, Scotto was reluctant to vote to terminate

and expressed concern that the fund might be exposed to a lawsuit. *Id.* at 104-05.

A jury is presumed to have acted rationally. We must assume that the jury followed the court's instructions and arrived at a verdict based on those instructions. Unlike *Brown* and *Holzer*, where it was impossible to determine whether the jury had relied on invalid predicate acts, the jury in this case had to find kickbacks. *See United States v. Brennan*, 685 F. Supp. 883, 885 (E.D.N.Y. 1988) ("No rational jury could have found the defendant guilty under RICO based on the invalid wire fraud offenses without also basing its conviction on the valid Travel Act offenses."). Because the jury necessarily did not rely on the invalid mail and wire fraud violations, we will not vacate appellant's RICO convictions on this ground.[20]

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20. Appellants also raise the following issues on appeal: (1) the jury was incorrectly charged on what constitutes a "pattern" under RICO; (2) the government's decision to maintain the indictment and bring charges that could not be proven constituted prosecutorial misconduct; (3) the overbroad indictment permitted the government to introduce substantial amounts of prejudicial evidence; (4) the government failed to prove a single conspiracy; (5) the government's use of rebuttal summation to refer to an address book entry corroborating testimony about the second lunch meeting at "Paul and Jimmy's," when the address book was not specifically referred to by Higgins on direct or cross-examination, was error and the district court's corrective instruction did not cure its prejudicial effect; (6) the government during rebuttal summation improperly referred to defendants' failure to take the stand; (7) during rebuttal summation the government improperly suggested that defendants were involved in a prior kickback scheme with Friedland, even though the government had stipulated their non-involvement; (8) the cumulative effect of these errors made at the end of trial was prejudicial and warrants a new trial; (9) the district court erred in admitting the "Marlin Stipulation" regarding Friedland's prior conviction into evidence, and this error prejudiced appellants; (10) the district court erred in denying appellants' motions for a bill of particulars and severance;

VII. *CONCLUSION*

We will therefore reverse and vacate appellants' convictions for mail and wire fraud under Counts Two through Five of the redacted indictment. We will affirm appellants' convictions under Count One and Zauber's conviction under Count Six of the redacted indictment. Finally, because we are vacating the mail and wire fraud convictions, we will remand to the district court for resentencing. *United States v. Townsley*, 843 F.2d 1070, 1086 (8th Cir. 1988); *Holzer*, 840 F.2d at 1352.

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and (11) the cumulative effect of all errors warrants a new trial. Coar also argues (12) that he was not a "person" chargeable in the § 1962(c) conspiracy because it was not shown he was "associated with" Omni, and the district court therefore erred by not acquitting him. Zauber argues (13) that his conviction on Count Six was impermissibly tainted by prejudicial spillover and (14) that the government's introduction of evidence relating to his financial condition deprived him of a fair trial.

Finally, appellants appeal the district court's denial of their Fed.R.Crim.P. 33 motion. That motion alleged that the government's improper referral to Higgins's address book during rebuttal summation violated appellants' constitutional rights. It also alleged that the government used that evidence to corroborate the second lunch meeting at "Paul and Jimmy's" in New York when the government knew, from pre-marked exhibits not introduced as evidence, that Higgins was in Florida on the date of the alleged lunch meeting. That Rule 33 motion was filed in the district court after an appeal was taken to this court. We held the appeal pending the district court's resolution of the motion. The appeal of the district court's denial of the motion has been joined with the original appeal and is currently before us.

We have carefully considered these arguments and find them not to constitute reversible error.

APPENDIX

I N D I C T M E N T

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges that:

COUNT ONE

1. At times material to the allegations contained in this Indictment:

a. Local 701 of the International Brotherhood of Teamsters (hereinafter referred to as "Local 701"), with offices in North Brunswick, New Jersey, and was an "employee organization" within the meaning of Section 1954 of Title 18 of the United States Code and the provisions of Title I of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA", 29 U.S.C. Section 1002[4] and 1003[a] [2]) whose activities affected interstate commerce.

b. Local 701 maintained for its members an "employee pension benefit plan" (within the meaning of 29 U.S.C. Section 1002[2] and 18 U.S.C. Section 1954), which was known as the "Mid-Jersey Trucking Industry, Local 701 Pension Fund" (hereinafter referred to as the "Pension Fund").

c. Between approximately January 1, 1975 and January 1, 1983, the Defendant ROBERT COAR (the president of Local 701 until 1981) and the Defendant FRANK SCOTTO (a consultant to various trucking industry organizations) served as the sole trustees (within the meaning of Section 1954(1) of Title 18 of the United States Code) of the Pension Fund. Thereafter, Martin McDermott, Anthony Sidoti, Enrico Moscatello, Rocco Morongello, and Leon Smith served with the

Defendants ROBERT COAR and FRANK SCOTTO for varying periods of time as "new trustees".

d. The Defendant KENNETH P. ZAUBER was an attorney-at-law in the State of New Jersey and was retained in the position of "counsel" (within the meaning of Section 1954[1] of Title 18 of the United States Code) to and "chief executive officer" of the Pension Fund.

e. Omni Funding Group, Inc. (hereinafter referred to as "Omni"), with offices in Ft. Lauderdale, was a Florida based corporation, engaged in the business of making mortgage loans both within and without the State of Florida. As such, it constituted an enterprise, within the meaning of Section 1961(4) of Title 18 of the United States Code, which was engaged in and the activities of which affected interstate and foreign commerce.

f. The Defendant DAVID FRIEDLAND, A native of New Jersey and sometimes resident of Florida, was associated with and employed by Omni in the capacity of a hidden partner, manager, advisor, consultant, and operator, and thereby was an officer, counsel, agent and employee thereof, within the meaning of Title 18 United States Code, Section 1954. Prior to approximately January of 1977, he was retained as "counsel" to the Pension Fund, and thereafter, until approximately June of 1979, he served as counsel to Local 701[.] Commencing on May 24, 1982, and thereafter up to the date of the filing of this Indictment, the defendant DAVID FRIEDLAND was prohibited under the provisions of ERISA (29 U.S.C. Section 1111) from serving as a fiduciary, agent, custodian, counsel, or

consultant to any employee benefit plan, including particularly the Pension Fund herein.

g. Joseph J. Higgins, formerly a resident of New Jersey and later a resident of Florida, was associated with Omni as the owner of record and chief operating officer and thereby was an officer, counsel, agent and employee of an organization which provided benefit plan services to the Pension Fund within the meaning of Title 18 of the United States Code, Section 1954.

h. Omni and the Pension Fund entered into an agreement which had, among others, the following terms and conditions: (1) The Pension Fund would place twenty million dollars ($20,000,000) of its assets under the control of Omni for further investment in commercial and residential mortgage loans. (2) Omni represented that it had not employed and would not knowingly employ anyone who was barred under ERISA from holding a fiduciary position or anyone whose prior willful conduct had ever damaged the Pension Fund. (3) Omni agreed that no Pension Fund assets would be invested in any loan involving a bar, restaurant or tavern. (4) Omni promised not to use Pension Fund assets to make any commercial loan which exceeded ten percent (10%) of the corpus (i.e. an amount in excess of $2,000,000), unless it had prior approval from the Pension Fund. (5) Omni agreed that it would advise the Pension fund of any default with respect to any mortgage payment within thirty (30) days of the time when the payment became overdue. (6) Omni agreed that all loans would be secured by first or second mortgages and protected as to principal and interest either through mortgage insurance or by means of a bank letter of credit --

except that on commercial loans the protection need only cover fifteen percent (15%) of the appraised value of the mortgaged property. (7) Omni agreed to pay the Pension Fund interest on its investments at a rate of one percent (1%) above the six month treasury bill rate on each residential mortgage loan and two percent (2%) above the six month treasury bill rate for each commercial loan; and Omni was then entitled to keep as its compensation the difference between the amount paid and the amount produced by the actual interest rate charged to the borrower. (8) According to said agreement Omni was entitled to receive "origination fees" and "participations" in connection with such loans. (9) Omni agreed that any substantial material misrepresentation on its part, during the life of the agreement, rendered said agreement voidable by the Pension Plan.

i. By virtue of the aforesaid agreement, Omni became an organization which provided benefit plan services to the Pension Fund, within the meaning of Section 1954(4) of Title 18 of the United States Code; and, as a result of the aforesaid agreement, the Defendant DAVID FRIEDLAND as well as Joseph J. Higgins became fiduciaries with respect to the Pension Fund, under the provisions of ERISA (29 U.S.C. Section 1002(21)).

j. The defendants ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER were associated with Omni in that each said defendant would and did solicit, agree to receive, and in fact received concealed payments from the profits which Omni would and did make through the aforesaid agreement with the Pension Fund.

2. Continuously between approximately March of 1982 and the date of the filing of this indictment, in the District of New Jersey and elsewhere, the Defendants

DAVID FRIEDLAND,
ROBERT COAR,
FRANK SCOTTO and
KENNETH P. ZAUBER

unlawfully did knowingly and willfully combine, conspire, confederate, and agree together and with others, who are both known and unknown to the Grand Jury, to conduct and to participate directly and indirectly in the conduct of the affairs of Omni through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code, as follows:

a. The Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER and their co-conspirators would and did devise various schemes and artifices to defraud the Pension Fund and its Beneficiaries of money and property and of the right to honest, faithful, prudent and diligent services by its employees -- all relating to the Pension Fund's dealings with Omni, and to the manner in which Omni would invest and otherwise handle said $20,000,000 in Pension Fund assets, as described hereinafter -- and in furtherance of each said scheme and artifice the said Defendants and their co-conspirators would, on numerous occasions during the period aforesaid, place in certain post offices and authorized depositories for mail matter and willfully cause to be sent and delivered by the Postal Service certain matters and things -- being more specifically contracts, reports, checks, business correspondence, and other documents

relating to the investment of the Pension Fund assets by Omni -- all for purposes of executing and attempting to execute the aforesaid schemes and artifices and all in violation of Sections 1341 and 2 of Title 18 of the United States Code;

b. The Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER and their co-conspirators would and did devise various schemes and artifices to defraud the Pension Fund and its Beneficiaries of money and property and of the right to honest, faithful, prudent and diligent services by its employees -- all relating to the Pension Fund's dealings with Omni, and to the manner in which Omni would invest and otherwise handle said $20,000,000 in Pension Fund assets, as described hereinafter -- and in furtherance of each said scheme and artifice the said Defendants and their co-conspirators would, on numerous occasions during the period aforesaid, transmit and willfully cause to be transmitted by means of wire and radio communication in interstate commerce certain signs, signals, and sounds -- all for purposes of executing the aforesaid schemes and artifices and all in violation of Sections 1343 and 2 of Title 18 of the United States Code; and

c. The Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER, along with their co-conspirators, by virtue of their respective positions in regard to the Pension Fund would, on multiple occasions solicit, agree to receive, and actually receive certain kickbacks, gifts, loans, money, and things of value because of their actions, decisions, and other duties relating to questions and matters concerning the Pension Fund, as described

hereinafter -- all in violation of Sections 1954 and 2 of Title 18 of the United States Code.

d. The Defendants DAVID FRIEDLAND, and his co-conspirator Joseph J. Higgins would, on multiple occasions give, offer, promise to give and promise to offer certain fees, kickbacks, commissions, gifts, loans, money, and things of value to Defendants ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER, because of said Robert Coar's, Frank Scotto's, and Kenneth P. Zauber's actions, decisions, and duties regarding the assets of the Pension Fund and its dealings with Omni, as described hereinafter -- all in violation of Sections 1954 and 2 of Title 18 of the United States Code.

3. *Manner and Means*

It was part of the conspiracy that the Defendants would and did utilize a variety of stratagems to enrich themselves unjustly and fraudulently with respect to the $20,000,000 of Pension Fund assets entrusted to Omni, including:

a. *ROBERT COAR and FRANK SCOTTO "Kickbacks"*: It was part of said conspiracy that between approximately April of 1982 and November of 1982, the Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins would and did offer to give Defendants ROBERT COAR and FRANK SCOTTO a portion of the profits which Omni would make from investing the aforesaid $20,000,000 of Pension Fund assets, and Defendants ROBERT COAR and FRANK SCOTTO would and did agree to accept said share of Omni's profits, in return for causing the Pension Fund to enter into the aforesaid agreement with Omni and otherwise assisting

Omni in its dealings with the Pension Fund. Defendants ROBERT COAR and FRANK SCOTTO thereafter would and did share in said profits -- receiving said shares on multiple occasions through various stratagems designed to conceal the aforesaid facts from other Pension Fund employees and, subsequent to January 1, 1983, from the "new trustees."

b. *KENNETH P. ZAUBER "Kickbacks"*: It was further part of said conspiracy that, commencing during approximately May of 1982, and regularly thereafter, Defendant KENNETH P. ZAUBER would and did solicit, request and demand from Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins that, in return for assisting Omni in its dealings with the Pension Fund, he [would] also share in Omni profits from investment of the aforesaid $20,000,000 of Pension Fund assets. Pursuant to said requests, demands and solicitations, KENNETH P. ZAUBER would and did, on multiple occasions, receive money and other things of value from Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins --all of which would be and was concealed from other Pension Fund employees and, subsequent to January 1, 1983, from the "new trustees."

c. *David Friedland's Hidden Role in Omni*: It was further part of the said conspiracy that commencing during approximately April of 1982, the Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER, and co-conspirator Joseph J. Higgins would and did conceal from the Pension Fund, employees of the Pension Fund, and, later from the "new trustees" that Defendant DAVID FRIEDLAND was associated with Omni, was exercising control

over the investment and disposition of the $20,000,000 in Pension Fund assets entrusted to Omni, and was sharing in over $3,000,000 in profits received by Omni through the investment and disposition of said assets -- notwithstanding the fact that he was prohibited from doing so by the provisions of ERISA (29 U.S.C. Section 1111). In furtherance thereof, during October of 1982 said Defendants would and did cause a "letter-memorandum of understanding" between Omni and the Pension Fund to be executed which falsely represented that Omni had not and would not knowingly employ anyone who was barred by ERISA from holding a fiduciary position, or anyone whose willful conduct had ever harmed the Pension Fund. Thereafter, and up until the date of the filing of this indictment said Defendants would and did continue by diverse means to conceal Defendant DAVID FRIEDLAND's hidden interest and involvement in Omni.

d. *The "Back-dated Letter"*: It was further part of the conspiracy that Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER and their co-conspirator Joseph J. Higgins would and did cause Omni to issue loans of Pension Fund assets in excess of the ten percent (10%) lending limit without prior approval from the Pension Fund. In order to conceal said misconduct from the "new trustees", during approximately January of 1984, the Defendants DAVID FRIEDLAND and KENNETH P. ZAUBER and their co-conspirator Joseph J. Higgins would and did fabricate a letter, on Pension Fund letterhead, which would be and was back-dated to "December 9, 1982." This letter would and did purport to authorize Omni to make

loans of Pension Fund assets up to a limit of five million dollars ($5,000,000) without prior approval from the Pension Fund. In an effort to deceive the "new trustees" with respect to the past loans which exceeded the ten percent (10%) lending limit Joseph J. Higgins would and did display this letter as his authority for having made the said loans during a meeting with the "new trustees" in January of 1984.

e. *Holdback Accounts and Delinquent Loans*: It was further part of said conspiracy that Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins aided and abetted by Defendants ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER would and did conceal that mortgage payments on various loans of Pension Fund assets were delinquent and that said loans were in default as follows: Beginning in approximately December of 1982 and continuing thereafter until approximately October of 1984, the Defendants ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER would and did purport to authorize Omni to permit borrowers to post a cash deposit in lieu of obtaining mortgage insurance or a bank letter of credit as specifically required under the terms of the agreement with the Pension Fund. As a result, Omni would regularly withhold fifteen (15%) of the face amount of each loan issued from the Pension Fund assets, and it would place this amount (hereinafter referred to as the "hold-back") in a separate accounts under Omni's control. Thereafter, whenever payments on such a loan would fall into arrears, Omni would not notify the Pension Fund of the delinquency with respect to the payments and of the potential for a default, as required by the

contract, but instead Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins, aided and abetted by Defendants ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER, would and did cause mortgage payments to be made on the said loan from the aforesaid holdback money, thereby concealing said delinquencies and creating the false and misleading impression with the Pension Fund that such loans were not in jeopardy. This would cause the "new trustees" not to inquire into their status and propriety of Omni's loans and Omni's handling of the Pension Fund assets and would enable the said Defendants to continue to reap profits by controlling the Pension Fund's $20,000,000. During the aforesaid period of time hold-back accounts on loans issued from Pension Fund assets were depleted through the aforesaid scheme in the amounts reflected below:

DELINQUENT LOAN	PRINCIPAL AMOUNT OF LOAN	AMOUNT ORIGINALLY PLACED IN HOLD-BACK	APPROXIMATE AMOUNT OF MORTGAGE PAYMENTS FROM HOLD-BACK
Bonanza Lodge	$ 232,800	$ 34,920	$ 38,170
Joseph Crevier	1,000,000	150,000	134,480
John Jarvis	728,000	109,200	109,715
Landmark Apostolic Church	800,000	120,000	72,340
Michael Lipson	70,000	10,500	1,835
McKinnon & Associates	428,000	64,200	55,550
Leonard J. Mercer	500,000	75,000	19,685
Albert Muth	750,000	112,500	52,712
Sterner/Suarez	45,000	6,750	2,185

f. It was further part of said conspiracy that Defendant DAVID FRIEDLAND and

Co-Conspirator Joseph J. Higgins aided and abetted by Defendants ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER would and did cause Omni to make loans of Pension Fund assets which were: (a) for purposes prohibited by the express terms of the agreement between Omni and the Pension Fund; (b) secured by inadequate collateral, in violation of the terms of said agreement; and (c) otherwise improper and imprudent.

g. It was further part of the conspiracy that between approximately January 1, 1983 and October 1984 Defendants ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER would endeavor to thwart discovery by the "new trustees" of the aforesaid schemes, and prevent said "new trustees" from taking appropriate remedial action, through repeated acts of malfeasance and non feasance which would include: (1) Falsely advising said "new trustees" that they had no responsibilities or duties with respect to Omni's loans of Pension Fund assets; (2) Falsely advising said "new trustees" that the so-called "hold back" accounts would adequately protect the Pension Fund's interests in the event that mortgages made by Omni went into default; (3) Endeavoring to deter the said "new trustees" from initiating an independent investigation of Omni's activities by outside auditors and attorneys; (4) Endeavoring to convince the "new trustees" to keep the Omni/Pension Fund agreement in force after the "new trustees" had concluded that the Pension Fund's relationship with Omni was detrimental to the best interests of the Pension Fund's beneficiaries; (5) Otherwise withholding and concealing their knowledge of the aforesaid schemes from the "new trustees."

Racketeering Acts

4. It was further party of said conspiracy that the defendants would each play various roles and would agree to commit the following acts in a pattern of racketeering activity:

(1) *ROBERT COAR and FRANK SCOTTO Kickbacks*

(a) Between approximately April of 1982 and October of 1984, The Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO, and co-conspirator Joseph J. Higgins would and did devise a scheme and artifice to defraud the Pension Fund and the beneficiaries thereof, of the right to honest, faithful prudent and diligent services by the Pension Fund's employees in that Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins would and did agree to give, and Defendants ROBERT COAR and FRANK SCOTTO would and did agree to receive, a concealed share of the profits which Omni would make from investing the aforesaid $20,000,000 of Pension Fund assets, in return for Defendants ROBERT COAR and FRANK SCOTTO causing the Pension Fund to enter into the aforesaid agreement with Omni and otherwise assisting Omni in its dealings with the Pension Fund -- all as further described in paragraph 3(a) above. The said Defendants, for the purpose of executing the aforesaid scheme and artifice to defraud would and did, on multiple occasions, unlawfully, knowingly and willfully cause to be placed in certain post offices and authorized depositories for mail matter and to be delivered by the United States Postal Service according to the directions thereon certain matters and things -- being more specifically

contracts, business correspondence and other documents relating to Omni's dealing with the Pension Fund -- all of which would be and was in violation of Sections 1341 and 2 of Title 18 of the United States Code;

(b) Between approximately April of 1982 and October of 1984, for the purpose of executing the aforesaid scheme and artifice to defraud, described in Paragraphs 3a and 4(1)(a) above, the Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO, and co-conspirator Joseph J. Higgins would and did, on multiple occasions, unlawfully transmit and willfully cause to be transmitted by means of wire and radio communications in interstate commerce certain signs, signals and sounds -- all of which would be and was in violation of Sections 1343 and 2 of Title 18 of the United States Code;

(c) Between approximately April of 1982 and October of 1984, the Defendants ROBERT COAR and FRANK SCOTTO would and did, on multiple occasions, solicit, agree to receive and actually receive certain fees, kickbacks, commissions, gifts, money and things of value, as described in Paragraph 3a above, because of their actions, duties, and decisions regarding the assets of the Pension Fund and matters pertaining to the Pension Fund's dealings with Omni -- all of which would be and was in violation of Sections 1954 and 2 of Title 18 of the United States Code;

(2) *KENNETH P. ZAUBER Kickbacks*

(a) Between approximately May of 1982 and October of 1984, the Defendants DAVID FRIEDLAND and KENNETH P. ZAUBER, and co-conspirator Joseph J. Higgins would and did

devise a scheme and artifice to defraud the Pension Fund, and the beneficiaries thereof, of the right to honest, faithful prudent and diligent services by the Pension Fund's employees in that Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins would and did agree to give, and Defendant KENNETH P. ZAUBER would and did agree to receive, a concealed share of the profits which Omni would make from investing the aforesaid $20,000,000 of Pension Fund assets, in return for Defendant KENNETH P. ZAUBER's assistance to Omni in its dealings with the Pension Fund -- all as further described in paragraph 3(b) above. The said Defendants, for the purpose of executing the aforesaid scheme and artifice to defraud would and did, on multiple occasions, unlawfully, knowingly and willfully cause to be placed in certain post offices and authorized depositories for mail matter and to be delivered by the United States Postal Service according to the directions thereon certain matters and things -- being more specifically contracts, business correspondence and other documents relating to Omni's dealings with the Pension Fund -- all of which would be and was in violation of Sections 1341 and 2 of Title 18 of the United States Code;

(b) Between approximately May of 1982 and October of 1984, for the purpose of executing the aforesaid scheme and artifice to defraud, described in Paragraphs 3b and 4(2)(a) above, the Defendants DAVID FRIEDLAND and KENNETH P. ZAUBER, and co-conspirator Joseph J. Higgins would and did, on multiple occasions, unlawfully transmit and willfully cause to be transmitted by means of wire and radio communications in

interstate commerce certain signs, signals and sounds -- all of which would be and was in violation of Sections 1343 and 2 of Title 18 of the United States Code;

(c) Between approximately May of 1982 and October of 1984, The Defendant KENNETH P. ZAUBER would and did, on multiple occasions, solicit, agree to receive and actually receive certain fees, kickbacks, commissions, gifts, money and things of value, as described in Paragraph 3b above, because of and his actions, duties, and decisions regarding the assets of the Pension Fund and matters pertaining to the Pension Fund and its dealings with Omni -- all of which would be and was in violation of Sections 1954 and 2 of Title 18 of the United States Code;

(3) *"Hold-Back" accounts and Delinquent Loans*

(a) Between approximately December of 1982 and October of 1984, the Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER and co-conspirator Joseph J. Higgins would and did devise a scheme and artifice to defraud the Pension Fund and the beneficiaries thereof of the right to honest, faithful, prudent and diligent services by the Pension Fund's employees in that Defendant DAVID FRIEDLAND and co-conspirator Joseph J. Higgins, aided and abetted by Defendants ROBERT COAR, FRANK SCOTTO and KENNETH P. ZAUBER, would and did conceal delinquencies and defaults on various loans of Pension Fund assets made by Omni by failing to notify the Pension Fund of said delinquencies and defaults and by causing mortgage payments on said loans to be made from "hold-back" accounts -- thereby

creating the false and misleading impression with the Pension Fund that said loans were not in jeopardy and enabling the said Defendants to continue to reap profits by controlling the Pension Fund's $20,000,000 -- all as further described in Paragraph 3e above. Said Defendants, for the purpose of executing the aforesaid scheme and artifice to defraud would and did, on multiple occasions, unlawfully, knowingly and willfully cause to be placed in certain post offices and authorized depositories for mail matter and to be delivered by the United States Postal Service according to the directions thereon certain matters and things -- being more specifically contracts, reports, mortgage documents, business correspondence and other documents relating to said loans -- all of which would be and was in violation of Sections 1341 and 2 of Title 18 of the United States Code.

(b) Between approximately January of 1983 and October of 1984, for the purpose of executing the aforesaid scheme and artifice to defraud, described in Paragraphs 3e and 4(4)(a) above, the Defendants DAVID FRIEDLAND, ROBERT COAR, FRANK SCOTTO, and KENNETH P. ZAUBER and co-conspirator Joseph J. Higgins would and did, on multiple occasions, unlawfully transmit and willfully cause to be transmitted by means of wire and radio communications in interstate commerce certain signs, signals and sounds -- all of which would be and was in violation of Sections 1343 and 2 of Title 18 of the United States Code.

All of which was in violation of Section 1962(d) of Title 18 of the United States Code.

COUNT TWO

1. Paragraphs 1, 3(a), and 4(1)(a) of Count One are hereby realleged and incorporated as though set forth fully herein.

2. On or about June 22, 1982, in the District of New Jersey and elsewhere, the Defendants herein,

DAVID FRIEDLAND,
ROBERT COAR, and
FRANK SCOTTO,

for the purpose of executing the aforesaid scheme and artifice to defraud the Pension Fund, unlawfully did knowingly and willfully cause to be placed in a certain post office and authorized depository for mail matter and to be delivered by the United States Postal Service according to the directions thereon, the following matter and thing -- being a letter from Omni to the Pension Fund soliciting the Pension Fund's interest in Omni's investment proposal, which was mailed from Omni in Ft. Lauderdale, Florida to the Pension Fund's offices in North Brunswick, New Jersey.

All of which was in violation of Sections 1341 and 2 of Title 18 of the United States Code.

COUNT THREE

1. Paragraphs 1, 3(a), and 4(1)(a) and 4(1)(b) of Count One are hereby realleged and incorporated as though set forth fully herein.

2. On or about October 14, 1982, in the District of New Jersey and elsewhere, the Defendants herein,

DAVID FRIEDLAND,
ROBERT COAR, and
FRANK SCOTTO,

for the purpose of executing the aforesaid scheme and artifice to defraud the Pension Fund, unlawfully did

knowingly and willfully transmit and cause to be transmitted by means of wire and radio communication in interstate commerce, between the offices of the New Jersey National Bank in New Jersey and the Southeast Bank N.A. in Miami, Florida, certain signals and sounds -- being the wire transfer of $15,000,000 of the Pension Fund's assets from said New Jersey National Bank to said Southeast Bank, N.A.

All of which was in violation of Sections 1343 and 2 of Title 18 of the United States Code.

COUNT FOUR

1. Paragraphs 1, 3(a), and 4(1)(a) of Count One are hereby realleged and incorporated as though set forth fully herein.

2. On or about December 9, 1982, in the District of New Jersey and elsewhere, the Defendants herein,

DAVID FRIEDLAND,
ROBERT COAR, and
FRANK SCOTTO,

for the purpose of executing the aforesaid scheme and artifice to defraud the Pension Fund, unlawfully did knowingly and willfully cause to be placed in a certain post office and authorized depository for mail matter and to be delivered by the United States Postal Service according to the directions thereon, the following matter and thing -- being a letter to the Magten Asset Management Corp directing said corporation to transfer $5,000,000 of the Pension Fund's assets to the Southeast Bank N.A., which letter was mailed from the Pension Fund's offices in North Brunswick, New Jersey to the Magten Asset Management Corp. in New York City, New York.

All of which was in violation of Sections 1341 and 2 of Title 18 of the United States Code.

COUNT FIVE

1. Paragraphs 1, 3(b), and 4(2)(a) of Count One are hereby realleged and incorporated as though set forth fully herein.

2. On or about December 6, 1982, in the District of New Jersey and elsewhere, the Defendants herein,

DAVID FRIEDLAND and
KENNETH P. ZAUBER

for the purpose of executing the aforesaid scheme and artifice to defraud the Pension Fund, unlawfully did knowingly and willfully cause to be placed in a certain post office and authorized depository for mail matter and to be delivered by the United States Postal Service according to the directions thereon, the following matter and thing -- being a letter from KENNETH P. ZAUBER to Omni authorizing Omni to utilize so-called holdback accounts in lieu of mortgage insurance or letters of credit, which was mailed from the Pension Fund's offices in North Brunswick, New Jersey to Omni in Ft. Lauderdale, Florida.

All of which was in violation of Sections 1341 and 2 of Title 18 of the United States Code.

COUNT SIX

1. Paragraphs 1, 3(b), and 4(2)(c) of Count One of this indictment are realleged and incorporated as though fully set forth herein.

2. Between approximately January 1, 1983 and April of 1984 in the District of New Jersey and elsewhere, the Defendant herein,

KENNETH P. ZAUBER,

unlawfully did solicit, and agree to receive from Omni certain kickbacks, commissions, loans, gifts and other

things of value, consisting of sums of money from Omni because of his actions, duties and decisions regarding the assets of the Pension Fund and matters pertaining to the Pension Fund and its dealings with Omni.

All of which was in violation of Section 1954 of Title 18 of the United States Code.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5292, 87-5293 & 87-5294
Nos. 88-5244, 88-5245 & 88-5246

UNITED STATES OF AMERICA,
Appellee

v.

KENNETH P. ZAUBER,
Appellant at
Nos. 87-5292 & 88-5244

UNITED STATES OF AMERICA,
Appellee

v.

ROBERT COAR,
Appellant at
Nos. 87-5293 & 88-5245

UNITED STATES OF AMERICA,
Appellee

v.

FRANK SCOTTO,
Appellant at
Nos. 87-5294 & 88-5246

On Appeal from the United States
District Court for the District
of New Jersey
(D.C. Criminal Action Nos.
85-00332-03, 85-00332-04
and 85-00332-05)

Argued: April 13, 1988
BEFORE: BECKER, HUTCHINSON
and SCIRICA, *Circuit Judges*

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed August 31, 1988, be amended as follows:

Page 9, delete from the first line of the text "pension fund suffered a loss" and insert "defendants schemed to defraud the pension fund of tangible property."

Page 9, insert the following sentence at the end of the second line of text: "The government need not, of course, prove that the scheme was successful in order to sustain a conviction for mail fraud. *United States v. Pearlstein*, 576 F.2d 531, 542 (3d Cir. 1978)."

Page 17, delete the last sentence of text and insert the following: "Unlike *Asher*, the record here does not show that a better deal was available when the trustees made the Omni investment."

BY THE COURT,

/s/ William D. Hutchinson

Circuit Judge

DATED: November 10, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5292, 87-5293 & 87-5294
Nos. 88-5244, 88-5245 & 88-5246

UNITED STATES OF AMERICA,
Appellee,

v.

KENNETH P. ZAUBER,
Appellant at
Nos. 87-5292 & 88-5244

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT COAR,
Appellant at
Nos. 87-5293 & 88-5245

UNITED STATES OF AMERICA,
Appellee,

v.

FRANK SCOTTO,
Appellant at
Nos. 87-5294 & 88-5246

On Appeal from the United States District
Court for the District of New Jersey
(D.C. Criminal Action Nos. 85-00332-03,
85-00332-04 and 85-00332-05)

SUR PETITION FOR PANEL REHEARING

PRESENT: BECKER, HUTCHINSON and SCIRICA, Circuit Judges

The petition for panel rehearing filed by appellee in the above captioned matters having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

DATED: NOV 10 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5292 & 88-5244

UNITED STATES OF AMERICA,
Appellee

v.

KENNETH P. ZAUBER,
Appellant

On Appeal from the United States District Court for the District of New Jersey
(D.C. Criminal Action No. 85-00332-03)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,
Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing in banc is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

DATED: NOV 10 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5293 & 88-5245

UNITED STATES OF AMERICA,
Appellee

v.

ROBERT COAR,
Appellant

On Appeal from the United States District Court for the District of New Jersey
(D.C. Criminal Action No. 85-00332-04)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,
Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing in banc is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

DATED: NOV 10 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5294 & 88-5246

UNITED STATES OF AMERICA,
Appellee

v.

FRANK SCOTTO,
Appellant

On Appeal from the United States District Court for the District of New Jersey
(D.C. Criminal Action No. 85-00332-05)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,
Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing in banc is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

DATED: NOV 10 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5292

UNITED STATES OF AMERICA,

vs.

Kenneth P. Zauber, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 17, 1988.

/s/ William D. Hutchinson
Circuit Judge

Dated: DEC 8 - 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5292/3/4 and 88-5244/5/6

UNITED STATES OF AMERICA,

vs.

Kenneth P. Zauber, Appellant in
Nos. 87-5292 and 88-5244

vs.

Robert Coar, Appellant in
Nos. 87-5293 and 88-5245

vs.

Frank Scotto, Appellant in
Nos. 87-5294 and 88-5246

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the

certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 17, 1988.

/s/ William D. Hutchinson
Circuit Judge

Dated: DEC 8 - 1988

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
21400 United States Courthouse
601 Market Street
Philadelphia 19106-1790

SALLY MVROS
Clerk

Telephone
215-597-2995

June 16, 1988

(Marion Percell, Esquire
(Edna Ball Axelrod, Esquire
Roanne L. Mann, Esquire
Michael R. Perle, Esquire
(Robert E. Margulies, Esquire
(Clifford A. Herrington, Esquire

Re: United States of America
v.
Kenneth P. Zauber,
Robert Coar, and
Frank Scotto
Nos. 87-5292, 5293, 5294
88-5244, 5245, 5246

Dear Counsel:

The Court requests the parties to submit supplemental memoranda of law on the following issues:

1. Whether paragraph 4(a)(c) of Count One of the redacted indictment sufficiently charges

Coar and Scotto with RICO conspiracy, aside from the mail and wire fraud allegations of paragraphs 4(1)(a),(b), 4(2)(a),(b), and 4(3) (a),(b); and whether 4(2)(c) does so with respect to Zauber. In this connection the parties are asked to discuss the issue of pattern and the type of indirect participation with Omni which falls within the statutory requirement that they be associated with Omni's "conduct" of its affairs through a "pattern" of § 1954 violations.

2. Whether the jury's verdict with respect to Count One can be supported in law or fact on the basis of a conspiracy to give and receive kickbacks in violation of RICO § 1962(d) by indirect participation in the conduct of Omni's affairs through a pattern of offering kickbacks to an officer or employee of an employee benefit plan in violation of 18 U.S.C. § 1954;

3. Whether the sole reliance by the government on paragraphs 4(1)(c) and 4(2)(c) to sustain the redacted indictment (or the verdict) implicates any 5th or 6th amendment rights of appellants.

Responses (original and three copies) should be concise and may refer to previous submissions made to this Court. They are to be submitted by June 24, 1988.

Very truly yours,
Sally Mvros, Clerk

/s/ M. Elizabeth Ferguson
By: Chief Deputy Clerk

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The activities prohibited under the Racketeer Influenced and Corruption Organizations Act, 18 U.S.C. § 1961 et seq., include the following:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962.

The definitional section of RICO provides in pertinent part:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States

> Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . section 1954 (relating to unlawful welfare fund payments). . . ;
>
> . . .
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity . . . .

18 U.S.C. § 1961.

Section 1954 of Title 18, United States Code, which was cited in the indictment as a statutory violation constituting part of the alleged pattern of racketeering activity, provides in pertinent part:

> Whoever being --
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan . . .
>
> receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money,

> or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both . . . .

18 U.S.C. § 1954.

Article III, Section 2 of the United States Constitution provides in pertinent part that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-967 and 88-1027

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK SCOTTO AND ROBERT COAR, PETITIONERS

v.

UNITED STATES OF AMERICA

KENNETH P. ZAUBER, PETITIONER

v.

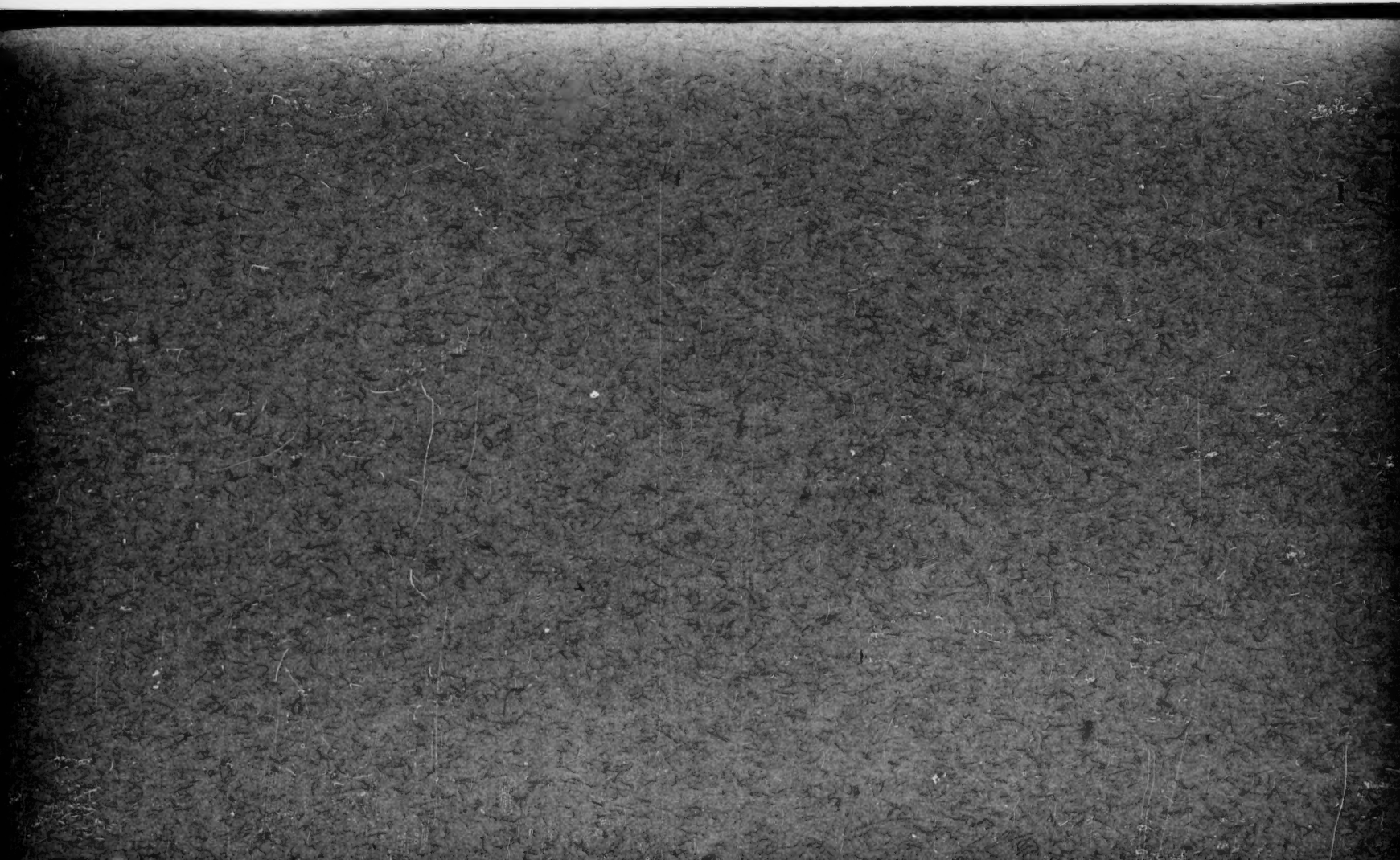
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners' RICO conspiracy convictions rested on jury findings of valid predicate acts of racketeering.

2. Whether the evidence established a sufficient nexus between the RICO enterprise and the predicate acts of accepting kickbacks.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-967

FRANK SCOTTO AND ROBERT COAR, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-1027

KENNETH P. ZAUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-38a)[1] is reported at 857 F.2d 137.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1988. Petitions for rehearing were denied on November 10, 1988. The petition for a writ of certiorari in

[1]"Pet. App." refers to the appendix to the petition in No. 88-967.

No. 88-967 was filed on December 10, 1988, and the petition for a writ of certiorari in No. 88-1027 was filed on December 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, in violation of 18 U.S.C. 1962(d). Petitioners Scotto and Coar were also convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of wire fraud, in violation of 18 U.S.C. 1343. In addition, petitioner Zauber was convicted on one count of mail fraud and one count of accepting kickbacks in connection with an employee pension benefit plan, in violation of 18 U.S.C. 1954. Each petitioner was sentenced to four years' imprisonment and fined $25,000. The court of appeals reversed the mail and wire fraud convictions in light of *McNally* v. *United States*, 483 U.S. 350 (1987), but affirmed the RICO conspiracy convictions and petitioner Zauber's conviction for accepting kickbacks. Pet. App. 3a-38a. The court of appeals then remanded the case to the district court for resentencing on the affirmed counts.

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 6a-9a), showed that petitioners and others planned and executed a kickback scheme involving pension fund money. Petitioners Scotto and Coar were lifetime trustees of the employee pension benefit plan for Local 701 of the International Brotherhood of Teamsters. Petitioner Zauber became general counsel to the pension fund in 1979, replacing David Friedland. In 1980, Friedland was con-

victed of receiving kickbacks in connection with a loan of pension fund monies. *Id.* at 6a.

In the spring of 1982, Friedland agreed with Joseph Higgins that they would try to obtain money from the pension fund to invest in Higgins' Omni Funding Group, a Florida-based mortgage company. Friedland was to be a partner in Omni, but because of his earlier conviction, his interest was to be hidden. Friedland told Higgins that he would discuss the matter with Scotto and Coar. Friedland later reported back to Higgins that Omni would have to pay kickbacks to Scotto and Coar to obtain the money. Pet. App. 6a.

Higgins mailed an investment proposal to the pension fund in June 1982. After a formal presentation, Higgins entered into negotiations with the trustees of the fund. Zauber conducted a superficial "due diligence" investigation of Higgins and Omni and reported favorably on them. Sometime after the presentation, Higgins, Friedland, Scotto, and Coar met at a New York restaurant so that Scotto and Coar could meet in person with Higgins and discuss the Omni investment. Pet. App. 6a-7a.

At some point, pension fund manager Alfred Piperata became suspicious of Higgins and conducted his own investigation. His inquiry revealed Higgins' prior bankruptcy, tax, and repossession problems, as well as his longtime friendship with David Friedland. When Piperata expressed concern to petitioners, he was told not to worry. Pet. App. 6a-7a.

In October 1982, Higgins and the pension fund entered into a formal contract. The pension fund agreed to transfer $20 million to Omni for 30 years; the fund transferred the money from its investment with the Magten Asset Management Corporation. On loans made with the money for residential mortgages, the pension

fund was to get a return one percent higher than the six-month treasury bill rate; on commercial mortgages, the fund was to receive a return two percent higher than the treasury rate. Omni was to retain any profit above those rates. The contract also provided that commercial loans using the pension fund's money could not exceed ten percent of the corpus, that residential loans were to require 100% insurance and commercial loans 15% insurance, and that individuals with prior convictions, such as David Friedland, were barred from any involvement in Omni. Zauber's fiancee, an associate at a Wall Street law firm, reviewed the contract. Pet. App. 7a.

In late November 1982, Omni was having trouble obtaining insurance on the loans. Higgins proposed changing the investment contract to allow Omni to hold back 15% of each loan in lieu of obtaining insurance or a letter of credit. Zauber approved Higgins' proposed amendment of the contract. Pet. App. 8a.

Higgins, Scotto, Coar, and Friedland had a second meeting in late 1982. At that meeting, Friedland requested that Scotto and Coar communicate with Omni through him rather than through Higgins. Friedland also discussed kickbacks and told Scotto and Coar that their share would come from his half of Omni's profits. Pet. App. 8a.

Beginning in late 1982, Zauber approached Higgins for money on at least six occasions. Higgins repeatedly directed Zauber to Friedland. Higgins also gave Friedland money to pay off Zauber, Scotto, and Coar. Pet. App. 8a.

In January 1983, four new trustees joined Scotto and Coar on the board of the pension fund. The new trustees were told that the old trustees (Scotto and Coar) would be solely responsible for any liability on prior investments and would continue to monitor them. In late 1983, however, the new trustees became aware of their own

responsibility, as fiduciaries, for continuing investments made by the fund. They also learned that, while Omni was paying approximately a 9% return to the fund on the $20 million the fund had placed with Omni, the money invested in the Magten Asset Management Corporation (from which the $20 million for Omni had been withdrawn) was paying 17%. Upon further investigation, the new trustees discovered that Omni had been violating the investment contract by making loans in excess of the ten percent corpus limit. Higgins, Friedland, and Zauber attempted to cover up those loans by backdating a letter from Zauber authorizing loans in excess of the limit. The new trustees also discovered that many of Omni's loans were in default and that Omni was making interest payments to the pension fund from the 15% holdback accounts, in violation of the investment contract. After the Department of Labor initiated an investigation, Scotto and Coar resigned as trustees, Zauber was fired, and the new trustees terminated the pension fund's investment contract with Omni. Pet. App. 9a.

2. The RICO conspiracy count of the indictment alleged that petitioners agreed to participate in the conduct of an "enterprise"—the Omni Funding Group—through a pattern of racketeering activity. The predicate acts of racketeering were alleged to be mail fraud, wire fraud, and numerous violations of 18 U.S.C. 1954, which makes it a crime for persons involved in the operation of an employee pension benefit plan to receive or to agree to receive or to solicit kickbacks in exchange for their influence in those operations. The jury, which convicted petitioners on all counts, did not return a special verdict expressly indicating which of the predicate acts of racketeering it relied on in convicting petitioners on the RICO conspiracy count.

3. The court of appeals reversed petitioners' mail and wire fraud convictions in light of *McNally* v. *United*

States, supra, but it affirmed petitioners' RICO conspiracy convictions and petitioner Zauber's conviction under 18 U.S.C. 1954. With respect to the RICO conspiracy charge, the court rejected (Pet. App. 31a-37a) the contention that the convictions had to be reversed because, as petitioners alleged, the jury might have relied on the invalid predicate acts charging mail and wire fraud. The court concluded (*id.* at 31a-32a)—based on the indictment, the jury instructions, and the verdicts—that it was clear that the jury found that each petitioner agreed to the commission of at least two valid predicate acts of receiving kickbacks. The court thus rejected petitioners' argument "[b]ecause the jury necessarily did not rely on the invalid mail and wire fraud violations." *Id.* at 37a.

The court also rejected (Pet. App. 26a-27a) the claim that the evidence was insufficient to establish that petitioners agreed to participate in the affairs of Omni through a pattern of racketeering activity. Petitioners contended that the evidence failed to show that they were aware that Omni was making loans in violation of the investment contract and using the holdback accounts of loans in default to make interest payments to the pension fund. The court concluded (*ibid.*) that, although petitioners may not have known what loans Omni made and to whom, they nonetheless agreed to participate in the affairs of Omni through racketeering acts by providing Omni with $20 million in capital from the pension fund in return for kickbacks.

ARGUMENT

1. Petitioners renew their claim (88-967 Pet. 15-22; 88-1027 Pet. 15-43) that their RICO conspiracy convictions must be reversed because it is impossible to determine from the jury's general verdict whether the jury relied

on the invalid mail and wire fraud allegations as predicate acts in finding them guilty. Petitioners rely on the principle—recognized in such cases as *Stromberg* v. *California,* 283 U.S. 359 (1931), *United States* v. *Brown,* 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), and *United States* v. *Holzer,* 840 F.2d 1343 (7th Cir. 1988)—that if a jury is provided with alternative grounds for conviction, if one of the grounds is invalid, and if it is impossible to determine which ground the jury relied on, then the conviction must be vacated because the jury might have relied on the invalid ground. The court of appeals in this case expressly applied that principle (Pet. App. 31a-32a) but found that reversal was not required because the jury necessarily concluded that each petitioner agreed to the commission of at least two valid predicate acts of receiving kickbacks. That essentially factual determination was correct and does not warrant this Court's review.

The district court instructed the jury (C.A. App. 1006-1008) that in order to convict petitioners on the mail and wire fraud counts it must find "an agreement by [each petitioner] to receive illegal cash payments" and thus that "the mailing was in furtherance of a kickback scheme." See Pet. App. 32a-33a. From the convictions of petitioners on those counts, it is clear that the jury concluded that each petitioner agreed that he would receive at least one kickback. That the jury so concluded is equally clear from petitioners' convictions for RICO conspiracy, because the district court instructed the jury (C.A. App. 991-992) that it could not convict petitioners of that offense without finding that each petitioner solicited, agreed to receive, or received "concealed payments." See Pet. App. 32a-33a. Accordingly, having found a conspiracy pursuant to which each petitioner agreed to receive at least one

kickback personally, the jury necessarily found an agreement among petitioners to receive multiple kickbacks.

That finding, as the court of appeals concluded (Pet. App. 32a), suffices to support the RICO conspiracy convictions and to satisfy the *Stromberg* principle. The multiple kickbacks to which petitioners agreed were valid predicate acts, independent of the invalid mail and wire fraud offenses. And as the district court correctly instructed the jury (C.A. App. 1000), in order to prove a defendant guilty of RICO conspiracy, the government need not show that "he agreed to personally commit * * * any racketeering acts"; rather, it need only show that "he agreed to the commission of two or more of those acts by any member of the conspiracy to further the criminal goals of the enterprise * * *." See *United States* v. *Kragness,* 830 F.2d 842, 860 (8th Cir. 1987); *United States* v. *Neapolitan,* 791 F.2d 489, 494-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986); *United States* v. *Joseph,* 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Adams,* 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985); *United States* v. *Tille,* 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Carter,* 721 F.2d 1514, 1528-1531 (11th Cir.), cert. denied, 469 U.S. 819 (1984).[2]

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[2] The RICO conspiracy count alleged as predicate acts of racketeering that each petitioner agreed to commit *multiple* violations of 18 U.S.C. 1954. Petitioner Zauber argues (88-1027 Pet. 30-34) that the agreements to accept kickbacks cannot support his RICO conspiracy conviction because it is impossible to know if the jury "achieved unanimity as to any specific violation of section 1954" (*id.* at 31). As we have shown, it necessarily follows from the district court's instructions and the jury's verdict that the jury unanimously found that each petitioner, as part of the overall conspiracy, agreed to the commission of at least two acts of accepting kickbacks. That finding was itself sufficient to support the RICO conspiracy convictions. The jury need not, in order for those convictions to be upheld, have reached any

Petitioner Zauber argues (88-1027 Pet. 24-28) that review is warranted because two court of appeals decisions—*United States* v. *Winter,* 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984)—express the view that a defendant must agree to commit two predicate acts of racketeering personally in order to be convicted of RICO conspiracy. That question is not properly before this Court, however, because petitioners did not object to the RICO conspiracy instruction in the district court and thus have waived the issue. See Pet. App. 34a n.17. In any event, the First and Second Circuit interpretation of Section 1962(d), which petitioner does not defend, is incorrect: RICO conspiracy incorporates the ordinary principle of conspiracy law that each conspirator must agree only that he will "participate in the conspiracy with knowledge of [its] essential objectives" (*United States* v. *Carter,* 721 F.2d at 1528 n.21), not that he will himself perform the illegal acts that constitute the conspiracy's objectives. As we have noted, the overwhelming majority of the circuits have so held. Furthermore, the *Winter* and *Ruggiero* decisions do not create a conflict that warrants this Court's review.

Although *Winter* contains language requiring that RICO conspirators agree to commit predicate acts personally, the issue was not presented in that case. The jury in *Winter* was in fact instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that RICO conspiracy requires more—the actual personal commission of two predicate acts of racketeering. The First Circuit rejected that argument. The court's broader statement that a RICO

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agreement as to whether any specific violation of Section 1954 was ever actually committed.

conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts.

The Second Circuit in *Ruggiero*, unlike the First Circuit in *Winter,* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of the RICO conspiracy statute, 18 U.S.C. 1962(d), arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with RICO conspiracy, based on two predicate acts. One of the two predicate acts was held to be legally insufficient on appeal: the court concluded that that alleged predicate act did not qualify as an act of racketeering at all. For that reason, Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one valid act of racketeering, and it was thus not a violation of Section 1962(d).

Finally, the *Ruggiero* case, like the *Winter* case, was decided before the issue had been presented to and considered by other courts. The *Ruggiero* court stated that it based its conclusion that a defendant must at least agree to commit two or more predicate crimes himself on the absence of controlling contrary authority. 726 F.2d at 921. At the time *Ruggiero* was decided, there was no contrary authority at all,[3] and the court considered its construction

[3] The Second Circuit decided *Ruggiero* just five days after the Eleventh Circuit's decision in *United States* v. *Carter, supra,* and evidently was not aware of that decision.

of Section 1962(d) to be required by "[p]revailing case law" (726 F.2d at 921). Since that time, all six circuits to consider the issue have ruled contrary to the Second Circuit. Because of that new case law, the Second Circuit might well reconsider its decision on this issue when presented with an opportunity to do so. This Court has denied certiorari on the same issue in several cases. *Finestone* v. *United States*, No. 87-5298 (Nov. 9, 1987); *Stewart* v. *United States*, 480 U.S. 919 (1987); *Neapolitan* v. *United States*, 479 U.S. 940 (1986); *Messino* v. *United States*, 479 U.S. 939 (1986); *Adams* v. *United States*, 474 U.S. 971 (1985); *Tille* v. *United States*, 469 U.S. 845 (1984); *Carter* v. *United States*, 469 U.S. 819 (1984). No different result is warranted here.[4]

2. Petitioners Scotto and Coar argue (88-967 Pet. 23-33) that there was no sufficient nexus between the RICO enterprise and the predicate acts of racketeering. They do not dispute the sufficiency of the evidence that they agreed to engage in a pattern of racketeering activity consisting of the receipt of kickbacks in violation of 18 U.S.C. 1954. They contend, however, that there was an insufficient nexus between Omni (the RICO enterprise) and their agreements to receive kickbacks (the racketeering acts), because they participated in the affairs of Omni, not through their agreements to receive kickbacks, but through the investment of the $20 million, which was not a

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[4] In the court of appeals, petitioners unsuccessfully argued that the evidence fell short of establishing a pattern of racketeering activity within the meaning of the RICO statute, 18 U.S.C. 1961(5), because all of the alleged predicate offenses were part of a single overall scheme. The issue whether a RICO pattern of racketeering requires multiple separate schemes is currently before this Court in *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, cert. granted, No. 87-1252 (Mar. 21, 1988). Petitioners, however, have not raised that issue in their petitions.

racketeering act. The court of appeals correctly rejected that contention. Pet. App. 28a-29a.

The RICO statute makes it a crime for a person associated with an enterprise whose activities affect commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * *." 18 U.S.C. 1962(c). To establish the required nexus ("participate * * * through * * * racketeering") between a legitimate RICO enterprise and the acts of racketeering committed by a defendant, the government must show either that the defendant was "enabled to commit the predicate offenses *solely by virtue of his position in the enterprise* or involvement in or control over the affairs of the enterprise" or that "the predicate offenses are related to the activities of the enterprise." *United States* v. *Robilotto,* 828 F.2d 940, 947-948 (2d Cir. 1987), cert. denied, No. 87-923 (Jan. 11, 1988), quoting *United States* v. *Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). Accord *United States* v. *Jannotti,* 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984). Or, as the court of appeals stated in *United States* v. *Cauble,* 706 F.2d 1322, 1333 (5th Cir. 1983) (footnote omitted), cert. denied, 465 U.S. 1005 (1984), the government must show that "the defendant's position in the enterprise facilitated his commission of the racketeering acts" and that "the predicate acts had some effect on the lawful enterprise." Accord *United States* v. *Horak,* 833 F.2d 1235, 1239 (7th Cir. 1987). See also *Yellow Bus Lines, Inc.* v. *Local Union 639,* 839 F.2d 782, 793 (D.C. Cir. 1988) (declining "to adopt a more restrictive standard than that enunciated in *Cauble* and *Scotto*").

Under the foregoing standards, the nexus between Omni and the predicate acts of receiving kickbacks was clearly sufficient. Petitioners Scotto and Coar were enabled to

obtain the kickbacks by virtue of their association with Omni as trustees of a pension fund investing $20 million in the company.[5] Moreover, as the *quid pro quo* for the $20 million investment, the receipt of the kickbacks manifestly affected Omni and was related to its activities. Just as the payment of kickbacks by Higgins and Friedland furthered the enterprise, so too did the other side of the same transaction—the receipt of those payments by petitioners Scotto and Coar. Indeed, the courts have repeatedly found a sufficient nexus between the enterprise and the pattern of racketeering in bribery cases involving outsiders who pay bribes to the enterprise or who receive bribes from it. See, *e.g., United States* v. *Yonan,* 800 F.2d 164, 168 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987); *United States* v. *Lee Stoller Enterprises, Inc.,* 652 F.2d 1313, 1320-1321 (7th Cir.), cert. denied, 454 U.S. 1082 (1981); *United States* v. *Bright,* 630 F.2d 804, 831 (5th Cir. 1980); *United States* v. *Forsythe,* 560 F.2d 1127, 1136 (3d Cir. 1977).[6]

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[5] The RICO statute applies to outsiders, including those who merely conduct business with the enterprise. See, *e.g., United States* v. *Yonan,* 800 F.2d 164, 167 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987); *United States* v. *Elliott,* 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

[6] Petitioners' reliance (88-967 Pet. 26-29) on *United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), and *United States* v. *Mandel,* 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1981), is misplaced. Neither case raised the issue of the sufficiency of the nexus between an enterprise and the predicate acts of racketeering in a situation in which the defendant was an outsider who received bribes from the enterprise. In *Nerone,* the court found no evidence of a nexus between illegal gambling conducted at a trailer park and the legitimate corporation that operated the park, ruling that mere "[g]eographical juxtaposition of the enterprises is insufficient." 563 F.2d at 852. In *Mandel,* the court contrasted the investment of funds in a business with the transfer of an interest out of the business and held that "the simple transfer of an ownership interest in [a legitimate] business does not constitute the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorneys

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conduct of the business through a pattern of racketeering activity even if the transfer is part of an alleged payoff in a mail fraud scheme." 591 F.2d at 1376.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH P. ZAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEIN, ZAUDERER, ELLENHORN,
FRISCHER & SHARP
SIDNEY H. STEIN*
ROANNE L. MANN
Attorneys for Petitioner
Kenneth P. Zauber
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

February 27, 1989

**Counsel of Record*

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OCTOBER TERM, 1988

KENNETH P. ZAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Kenneth P. Zauber respectfully submits this brief in response to the government's opposition[1] to his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third

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[1] Brief For The United States In Opposition ("Opp.").

Circuit, affirming his conviction for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). As demonstrated in our petition, the Court of Appeals erroneously affirmed petitioner's RICO conviction notwithstanding the fact that in returning its general verdict on that count, the jury might have relied on predicate acts of mail and wire fraud that the Court of Appeals struck as legally defective under McNally v. United States, 107 S.Ct. 2875 (1987).

ARGUMENT

One of several questions posed in this petition is whether a charge of conspiracy to violate section 1962(c) of the RICO statute requires that the government prove that the defendant agreed to participate himself in two or more predicate acts of racketeering, or, on the other

hand, whether the government need only prove that the defendant agreed that members of the conspiracy would commit such acts. The Third Circuit's decision rests on the latter, more expansive, interpretation of section 1962(d): Thus, the Court of Appeals upheld the jury's verdict with no assurance that petitioner was found to have agreed to participate personally in two or more valid acts of racketeering. Had petitioner been tried in the First or Second Circuit, his RICO conviction would have been reversed; unlike the Third Circuit and several other Courts of Appeals,[2] those two Circuits have declared that a conviction for conspiracy to violate section 1962(c) requires that the jury find that the defendant agreed to participate himself in two or more acts of

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[2] See cases cited in Zauber's Petition For Writ Of Certiorari ("Pet."), at pp. 24-25.

racketeering activity. See United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

The government's opposing brief in no way undermines petitioner's showing as to the need for resolution of this conflict among the Circuits. First, the government claims that "[t]hat question is not properly before this Court . . . because petitioners did not object to the RICO conspiracy instruction in the district court and thus have waived the issue." (Opp. 9). The government's waiver argument overlooks the language of the trial court's instructions to the jury: Simply put, petitioner had no reason to object, as the charge was far more favorable to the defense than was the

controlling law in the Third Circuit. See United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985) (defendant need not agree to commit two acts of racketeering).

After charging the jury in conformity with the Third Circuit's decision in Adams, the trial court instructed: "Insofar as each of the three defendants in this case is concerned, the government must prove beyond a reasonable doubt that he agreed to the commission of at least two of the racketeering acts charged as to him in paragraph 4 of Count 1." (A32 n.17,[3] quoting Jt. App. at 1002) (emphasis added). Paragraph 4 of Count 1 charges that petitioner participated in acts of racketeering separate and apart from those charged as to his co-defendants; indeed, the racketeering acts charged as to

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[3] "A" refers to pages in the Appendix to Zauber's petition.

petitioner are set forth in a separate subdivision of paragraph 4. (See A49-52). As the Third Circuit acknowledged, the trial court's further instruction "could be read to imply that each defendant must agree to personally commit the racketeering act" (A32 n.17) -- contrary to the Adams decision. Hence, petitioner understandably did not object to an instruction that, given Third Circuit precedent, "prejudiced the government, not these defendants . . . ." (A32 n.17). In these circumstances, petitioner cannot be said to have waived a claim that did not arise until the Third Circuit rendered its decision in this case.

In addition to its waiver argument, the government seeks to minimize the Courts of Appeals' decisions in Ruggiero and Winter, which require that RICO conspirators agree to participate in two

or more predicate acts of racketeering. Contrary to the government's claim (see Opp. 10), the Second Circuit's analysis of the RICO conspiracy issue was necessary to its decision in Ruggiero. In seeking to sustain the RICO conspiracy conviction of defendant Tomasulo, despite the invalidity of one of two predicate acts in which he was alleged to have participated, the government in Ruggiero expressly argued that "it is sufficient that Tomasulo was found to have conspired with others to engage through an enterprise in a pattern of racketeering consisting of predicate acts committed by others." 726 F.2d at 921. The Second Circuit rejected this "extremely broad interpretation of RICO" and reversed Tomasulo's conviction. Id.

The government now blithely asserts that "the Second Circuit might well reconsider its decision on this issue when

presented with an opportunity to do so." (Opp. 11). The government's unfounded speculation ignores the fact that the Second Circuit has reaffirmed its reasoning in Ruggiero. See United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986).[4] In short, Ruggiero remains the law of the Second Circuit, and has been consistently followed by courts in that Circuit. See, e.g., Zola v. Gordon, 685 F. Supp. 354, 377 (S.D.N.Y. 1988); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1440 (E.D.N.Y. 1988); Gruber v. Prudential-Bache Securities, Inc., 679 F. Supp. 165, 178 (D. Conn. 1987).

[4] Similarly, the First Circuit has not retreated from its interpretation of RICO conspiracy, as pronounced in Winter. See United States v. Torres Lopez, 851 F.2d 520, 528 (1st Cir. 1988); United States v. Angiulo, 847 F.2d 956, 964 (1st Cir.), cert. denied, 109 S.Ct. 138 (1988).

In reaffirming Adams, the Third Circuit's decision in Zauber rejects the theory adopted by the Courts in Ruggiero and Winter. Such a fundamental conflict ought to be resolved by this Court, particularly in light of other important issues presented in this case. As discussed more fully in our petition, the rationale of Stromberg v. California, 283 U.S. 359 (1931), further mandates that petitioner's RICO conviction be reversed, inasmuch as the jury might have relied on the invalid mail and wire fraud predicate acts -- and, given its verdicts on the substantive fraud counts, probably did rely on those defective allegations. Moreover, by sustaining petitioner's RICO conspiracy conviction on the basis of a pattern of racketeering activity consisting of a single criminal objective, without more, the Third Circuit's decision

in Zauber eviscerates the pattern-of-racketeering requirement[5] and threatens to eradicate the distinctions between section 1962(d) and the general conspiracy statute. This Court should review and reject such a profound reworking of the RICO statute.

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[5] Petitioner argued in the Court of Appeals that the proof fell short of establishing the requisite pattern of racketeering activity. The Third Circuit's striking of the fraud allegations further undermines the jury's finding on this essential element.

A related issue is currently before this Court in H.J., Inc. v. Northwestern Bell Tel. Co., cert. granted, Dkt. No. 87-1252 (March 21, 1988).

CONCLUSION

For the reasons stated above, and in our petition, we respectfully request that a writ of certiorari be granted so that this Court may consider the serious issues of federal law presented by this case.

February 27, 1989

Respectfully submitted,

SIDNEY H. STEIN
Counsel of Record
STEIN, ZAUDERER, ELLENHORN,
FRISCHER & SHARP
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

ROANNE L. MANN
Of Counsel